TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1944

No. 49

THE WESTERN UNION TELEGRAPH COMPANY, PETITIONER,

vs.

KATHARINE F. LENROOT, CHIEF OF THE CHILDREN'S BUREAU, UNITED STATES DEPARTMENT OF LABOR

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED APRIL 5, 1944.

CERTIORARI GRANTED MAY 8, 1944.

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INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JUNE 21, 1944.

[fol. 1]

IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

KATHARINE F. LENROOT, Chief of the Children's Bureau, United States Department of Labor, Plaintiff-Appellee,

against

THE WESTERN UNION TELEGRAPH COMPANY, a Corporation, Defendant-Appellant

STATEMENT UNDER RULE 13

The above entitled action was commenced in the District Court for the Southern District of New York by the filing of a complaint on August 11, 1942.

Personal service of the summons and complaint was made on the defendant-appellant on August 13, 1942.

The defendant-appellant's answer was both served and filed on September 2, 1942.

All of the facts were agreed upon by the attorneys for the respective parties hereto, under a stipulation dated June 18, 1943, and thereafter filed with the Clerk of the District Court for the Southern District of New York.

On July 23, 1943, the plaintiff-appellee made a motion for summary judgment returnable August 3, 1943.

On July 29, 1943, the defendant-appellant made a cross-motion for a summary judgment returnable August 3, 1943.

Both motions for summary judgment were heard August 3, 1943, by Honorable Simon H. Rifkind, United States District Judge.

[fol. 2] On October 7, 1943, Honorable Simon H. Rifkind, United States District Judge, filed an opinion granting the plaintiff-appellee's motion for summary judgment and denying the defendant-appellant's cross-motion for summary judgment.

Judgment in favor of the plaintiff-appellee and against the defendant-appellant was filed on November 16, 1943.

The defendant-appellant filed a notice of appeal on November 19, 1943.

No question was referred to a commission or commissioner, master or referee.

No change of parties has taken place.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

Civ. 19-78

[Same Title]

COMPLAINT—Filed August 11, 1942

I

Plaintiff brings this action to enjoin defendant from violating the provisions of Section 15(a) (4) of the Fair Labor Standards Act of 1938, c. 676, 52 Stat. 1060, 29 U. S. C., sec. 201, hereinafter called the Act.

[fol. 3] II

Jurisdiction of this action is conferred upon the Court by Section 17 of the Act.

III

Defendant is, and at all times hereinafter mentioned was, a corporation organized under and existing by virtue of the laws of the State of New York, having its principal office at 60 Hudson Street, in the City of New York, New York County, New York, within the jurisdiction of this Court, and having places of business and producing establishments situated in Baltimore, Maryland, Austin, Texas, San Antonio, Texas, Jacksonville, Texas, Flagstaff, Arizona, Woonsocket, Rhode Island, Portland, Maine, and numerous other cities throughout the United States, and is, and at all times hereinafter mentioned was, engaged at its said establishments in the production, sale, and transmission of telegraph messages.

IV

Within the period beginning on or about January 1, 1941 and continuing to the date hereof, defendant employed, suffered, and permitted to work in or about its said establishments many minors under sixteen (16) years of age.

V

Within the period beginning on or about January 1, 1942 and continuing to the date hereof, defendant employed,

suffered, and permitted to work in or about its said establishments many minors between sixteen (16) and eighteen (18) years of age in the occupation of motor vehicle driver, such employment being oppressive child labor, as defined in Section 3(1) of the Act and Child Labor Order No. 2 [fol. 4] thereunder. The said order was duly issued on November 27, 1939, by the Chief of the Children's Bureau, United States Department of Labor, and became effective in accordance with its terms, January 1, 1940. The said order was published in the Federal Register and is known as Title 29, Chapter 4, Code of Federal Regulations, Part 422, Section 422.2. A copy of the said order is attached hereto, made a part hereof, and marked "Exhibit A."

VI

Within the period beginning on or about January 1, 1941 and continuing to the date hereof, defendant has been engaged in shipping telegraph messages in interstate commerce and in delivering telegraph messages for shipment in interstate commerce, the said goods having been produced in its said establishments in or about which the aforesaid minors were employed, suffered, and permitted to work within thirty (30) days prior to the removal of said goods therefrom.

VII

The shipment and delivery for shipment in interstate commerce by defendant of telegraph messages produced in its said establishments in or about which the aforesaid minors were employed, suffered, and permitted to work within thirty (30) days prior to the removal of such goods therefrom constitute violations of Section 15(a)(4) of the Act. A judgment enjoining and restraining the violations hereinabove alleged is specifically authorized by Section 17 of the Act.

Wherefore, cause having been shown, plaintiff demands judgment enjoining and restraining defendant, its officers, agents, servants, employees, attorneys, and all persons acting or claiming to act in its behalf and interest, from violating the provisions of Section 15(a) (4) of the Act, both [fol. 5] permanently and during the pendency of this action,

and such other and further relief as may be necessary and appropriate.

Warner W. Gardner, Solicitor; Roy C. Frank, Assistant Solicitor; Julius Schlezinger, Principal Attorney; Arthur E. Reyman, Regional Attorney; United States Department of Labor, Attorneys for Plaintiff.

Post Office Address: Arthur E. Reyman, Regional Attorney, U. S. Department of Labor, Parcel Post Building, 341 Ninth Avenue, New York, New York or Solicitor's Office, U. S. Department of Labor, Washington, D. C.

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[fol. 6] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

Civ. 19-78

[Same Title]

ANSWER

The defendant in the above-entitled action, by Francis R. Stark and Clarence W. Roberts, its attorneys, answering the plaintiff's complaint herein,

1. Admits the allegations contained in the paragraphs thereof numbered I and II.

2. Admits the allegations contained in the paragraph thereof numbered III, except that defendant denies that the places of business therein referred to are producing establishments, and denies that defendant is or ever has been engaged in the production or sale of telegraphic messages at the establishments therein referred to or anywhere else.

3. Admits the allegations contained in the paragraph thereof numbered IV, except that defendant denies that the establishments therein referred to were producing establishments.

4. Admits the allegations contained in the paragraph thereof numbered V, except that defendant denies that the establishments therein referred to were producing establishments.

5. Denies the allegations contained in the paragraphs thereof numbered VI and VII, and denies each and every allegation in the complaint contained except as hereinbefore specifically admitted or denied.

[fol. 7] Further answering, defendant says that as it is advised by counsel and believes the lawfulness of employing messengers of any particular age in connection with its public telegraph business and the lawfulness of employing messengers of any particular age to operate motor vehicles in connection with its public telegraph business are matters exclusively regulated by the laws of the several States, and that there is no applicable Federal law of any kind whatever; that when the act which is now known as the Fair Labor Standards Act was under consideration by Congress an attempt was made to include a prohibition of oppressive child labor, as therein defined, in any occupation, but that Congress deliberately and purposely left the subject of child labor in the telegraph industry to regulation by the several States; that in every instance in which persons under sixteen have been employed by defendant, and in every instance in which persons under eighteen have been employed by defendant in the operation of motor vehicles, such employment has been lawful and has continued to be lawful under the local law; that no such persons have been employed by defendant except in the capacity of telegraph messengers; that it was the policy of defendant for many years not to employ messengers under sixteen for any purpose, and not to employ messengers under eighteen in the operation of motor vehicles, and such continued to be defendant's policy until the sharp increase in the volume of telegraph business because of the war and the difficulty of securing and maintaining an adequate force of older messengers because of their rapid absorption in war industries combined to produce a shortage of messengers which constituted a serious hazard to the defendant's part in the war effort; that for these reasons defendant has been compelled, since the dates named in the complaint, to employ a relative small number of younger messengers where the local law permitted; that the number of messengers under six-[fol. 8] teen has not at any one time exceeded approximately 5 per cent of the total number of defendant's messengers, and the messengers under eighteen engaged in the operation of motor vehicles (other than telemotors or

scooters) has not exceeded approximately 11/100 of 1 per cent (.0011) of the total number of messengers, or, if telemotor or scooter messengers are included, not more than 31/100 of 1 per cent (.0031); and that such operators of motor vehicles were not employed regularly, but on a temporary basis during emergencies or in handling holiday loads.

Wherefore, defendant asks judgment that the plaintiff's complaint be dismissed.

Francis R. Stark, Clarence W. Roberts, Attorneys for Defendant, Office & P. O. Address, 60 Hudson Street, New York, New York.

(Verified.)

[fol. 9] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

Civ. 19-78

[Same Title]

STIPULATION OF FACTS

To expedite the trial of the above-entitled action and to avoid the necessity of presenting detailed and voluminous oral testimony and documentary evidence, it is hereby stipulated and agreed by and between the attorneys for the plaintiff and the attorneys for the defendant, that:

1. The defendant is engaged in the transmission and delivery of telegraph messages throughout the United States and in foreign countries. The messages transmitted by the defendant are delivered to all parts of the world over telegraph land and cable lines operated by the defendant and over connecting land and cable lines and radio facilities operated by other companies which have agreements with the defendant to deliver such messages to areas not directly reached by the defendant's telegraph system.

2. In connection with its land line telegraph business the defendant operates telegraph offices located in large and small communities throughout the United States. These offices are linked together for telegraphic communication by approximately 209,000 miles of telegraph pole lines oper-

ated by the defendant, which traverse every state in the Union and the District of Columbia. The messages transmitted by the defendant are received and delivered by the following methods: messengers, over-the-counter, telephone, and private telegraph wire.

[fol. 10] 3. Approximately 15,000 telegraph messengers are employed by the defendant. These messengers work in some 3,100 public message telegraph offices, hereinafter termed public offices, operated by the defendant in every part of the United States. The duties of the messengers are to collect and deliver telegraph messages. Approximately 36 per cent of the telegraph messages transmitted by defendant are collected by defendant's messengers and about 64 per cent of such messages are delivered to their destination by such messengers.

4. The large majority of the telegraph messengers employed by the defendant use bicycles in the performance of their work. A smaller number, who work at offices serving compact and congested areas, collect and deliver telegraph messages on foot. In a lesser number of offices, messengers operate motor vehicles in performing their duties.

5. Defendant receives telegraph messages from the public at its public offices over-the-counter, by telephone, by telegraphic tie lines, and through defendant's messengers. Most messages received over-the-counter are inscribed on telegraph blanks in the public office, usually by their senders but in some cases by employees of the defendant who take down the message as dictated by the sender. Messages received by telephone are taken down and inscribed on telegraph blanks by operators employed by the defendant. Messages received by telegraphic tie lines are printed in the public office on a telegraph blank or on a gummed paper tape in the manner described in paragraph 7(a) below. Messages received at such offices by means of defendant's messengers are inscribed by their senders and picked up by the messengers at the establishments of their senders in response either to telephone requests or signals received at public offices from call boxes located in such establishments which are connected by wire with such offices. When a messenger collects a message and carries it to defendant's [fol. 11] office (or takes a message from defendant's office

and makes delivery), his activities with reference to the message end.

6. At the public office where the message originates, the message is stamped to show the date and time of filing. The number of words and class of telegraph service are also noted on the message. In some cases, where the clerk receiving the message at the public office is uncertain as to a word because of wrong spelling or illegibility, he will, in order to avoid error in the transmission of the message, inquire from the sender what the word is and print over the uncertain word the word intended to be meant. Where two words have wrongly been combined as one, or one word has erroneously been written as two words, the clerk will separate or combine the words. At the sender's request, he will also change words, or omit, or add words, in order to clarify the meaning of the message or to shorten it.

7. The message thus originating in a public office is then transmitted to a central operating room, usually in the same community or area, hereinafter called the message center. Except in a relatively few isolated cases where other methods are used, the transmission to the message center takes place either by teleprinter telegraph or by pneumatic tube. The method used in transmission in each case is as follows:

(a) *Teleprinter telegraph*—This is the method used in transmitting telegraph messages to message centers from the vast majority of public offices. Where this method is used, the public office is connected to the message center by a telegraphic circuit through which electric current flows and it is by means of this circuit that messages are transmitted between the two offices. A message originating at a public office is transmitted by the operation of a teleprinter machine which is con- [fol. 12] nected to the telegraphic circuit. A teleprinter operator employed at the public office manipulates a keyboard of the teleprinter, similar to the keyboard of an ordinary typewriter. Each depression of a key by the teleprinter operator causes interruptions and/or electric impulses in the electric current flowing through the telegraphic circuit. The number and spacing of such electric impulses represent letters of the alphabet and other significant symbols. These electric

impulses in turn cause a similar teleprinter in the message center to print the message at that office either on a telegraph blank or on a gummed paper tape which is then pasted on a telegraph blank.

(b) *Pneumatic tube*—In some cities this method is used in moving telegraph messages from public offices located in the same building or in the immediate vicinity of the message center. Where this method is used, an employee in the public office, after adding the telegraphic information referred to above, places the telegraph blank containing the message in a "carrier" capsule and inserts the "carrier" in the pneumatic tube, which carries it to the message center.

8. The message centers to which the messages have been forwarded from the public offices are connected with message centers in other communities by telegraphic circuits similar to the circuits connecting the message centers with its public offices. When the messages are received at the message center they are sent to a distributing center in that office where they are routed by writing on each message the name or symbol of the proper outgoing telegraphic circuit. They are then dispatched to the sending machine for such circuit. The written or printed messages are forwarded to different positions within the message center by means of [fol. 13] a conveyor belt, a pneumatic tube, an intra-office messenger, or a combination of these methods.

9. Telegraph messages are transmitted between message centers over connecting telegraph lines, usually by means of either teleprinters or multiplex printers, and, in a small number of instances, by means of Morse telegraphy. The method of transmission in each case is as follows:

(a) *Teleprinter transmission*—Teleprinter transmission between message centers is identical with teleprinter transmission between public offices and message centers described in paragraph 7(a) above.

(b) *Multiplex printer transmission* — Where this method is used a telegraphic circuit, similar to that used in teleprinter transmission, connects the message centers. Also, as in teleprinter transmission, the manipulation of the keyboard of a sending machine by

an operator at the message center from which the message is being dispatched causes a receiving machine in the other message center to reprint the message in the form of ordinary letters and symbols on a gummed paper tape. The transmission differs from teleprinter transmission, however, in that the operation of a multiplex printer, instead of creating electric impulses directly, first makes perforations in a tape in the sending office. This tape feeds directly into an automatic transmitter machine effecting changes in the electric current flowing through the telegraphic circuit and thus creating the electric impulses used in the transmission of the message. As in the case of teleprinter transmission the electric impulses activate the receiving machine into reprinting the message. Multiplex transmission enables eight messages to be sent over a single circuit at the same time.

[fol. 14] (c) *Morse telegraphy*—In Morse telegraphy the operation by hand of a key in the message center from which the message is sent causes electric impulses in the telegraphic circuit between the two message centers which in turn activates a sounding machine in the message center where the message is being received in the form of sounds representing the letters of the alphabet and other symbols. These sounds are translated and the message written down on a telegraph blank by an operator in the receiving office who is listening to the sounding machine.

10. Direct current electricity is used in telegraph transmission both between message centers and between message centers and public offices. In almost all instances this direct current is created at the message centers either by motor generators in such centers or by rectifying alternating current purchased from an electric power company.

11. After a message has been received at a message center from another message center it is routed through the distributing center in that office to the outgoing circuit connected with the proper public office, the operations involved in moving the message through the message center being similar to the operations performed with respect to messages received at the message center from a public office

for inter-city transmission. The message is then transmitted to the public office in the same fashion that messages originating at public offices are forwarded to the message center, usually by teleprinter transmission and, in the case of a small number of offices, by being dispatched physically through pneumatic tubes. Where the former method is used, the operation of the teleprinter in the message center causes a similar teleprinter in the public office to reprint the message.

[fol. 15] 12. Messages received at the public office by teleprinter telegraph are time-stamped at the public office and messages received via pneumatic tube have already been time-stamped at the connecting message center. In most instances no additional information is added at the public office. However, in the case of collect telegrams, notation of the tolls to be collected is placed on the telegraph blank in the public office. In most instances, the delivery of a telegraph message to the sendee from a public office is made by a messenger employed at such office.

13. A substantial proportion of the telegraph messages originating at all of the offices of the defendant is transmitted by defendant in inter-state commerce before delivery to their sendees. In most instances, the movement of the message across State lines occurs during its transmission between message centers. In addition, however, in the case of public offices in cities located near State lines, messages originating at such offices move across State lines during their transmission to connecting message centers in other States.

14. Within the period covered by the allegations of the complaint in this action, and continuing to the date hereof, defendant has employed in the public offices described above persons under 16 years of age as telegraph messengers, and persons between 16 and 18 years of age as telegraph messengers in the occupation of motor vehicle drivers, but only in those States where such employment is permitted by State law. The number of messengers under 16 years of age employed by defendant did not at any one time prior to September 2, 1942, the date of defendant's answer herein, exceed approximately 5 per cent of the total number of defendant's messengers, and the messengers between 16 and 18 years of age engaged in the operation of motor vehicles

(other than telemotors or scooters) during such period did [fol. 16] not exceed, approximately, .0011 per cent of the total number of messengers, or if telemotor or scooter messengers are included not more than .0031 per cent; and as of March 31, 1943, 11.14 per cent of the total number of messengers employed by defendant were under 16 years of age and .0033 per cent of the total number of messengers were between 16 and 18 years of age and employed as operators of motor vehicles, including telemotors and scooters.

Dated: New York, June 18, 1943.

Douglas B. Maggs, Solicitor. Irving J. Levy, Associate Solicitor. Julius Schlezinger, Principal Attorney. John K. Carroll, Regional Attorney. John A. Hughes, Attorney. United States Department of Labor, Attorneys for the Plaintiff.

(Sgd.) Francis R. Stark, Clarence W. Roberts, Attorneys for the defendant.

[fol. 17] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

Civ. 19-78

[Same Title]

PLAINTIFF'S NOTICE OF MOTION FOR SUMMARY JUDGMENT

To Francis R. Stark, Esquire, Attorney for Defendant, 60 Hudson Street, New York, New York:

Please take notice, that the undersigned will bring the attached motion for summary judgment on for hearing before this court at Room 506, United States Courts and Post Office Building, Borough of Manhattan, City of New York, on the third day of August, 1943, at 10:30 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard.

Douglas B. Maggs, Solicitor. Irving J. Levy, Associate Solicitor. Julius Schlezinger, Principal Attorney. John K. Carroll, Regional Attorney. John A. Hughes, Attorney. United States Department of Labor, Attorneys for the Plaintiff.

[fol. 18] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

Civ. 19-78

[Same Title]

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Comes now the plaintiff after filing of the defendant's answer and after the pleadings are closed, and moves the court for the entry of a summary judgment on the following grounds:

1. The pleadings and admissions on file, together with the affidavit filed on behalf of the plaintiff in support of this motion, disclose no genuine issue as to any material fact.

2. All of the material facts bearing upon the issues raised by the pleadings have been stipulated and agreed to by the attorneys for the plaintiff and the attorneys for the defendant in a stipulation of facts which has been filed in this action.

3. The pleadings and admissions on file, together with the supporting affidavit, disclose that the court may make a final disposition of this action without the necessity of a trial.

4. The pleadings and admissions on file, together with the supporting affidavit, show on their face that the plaintiff is entitled to the entry of an injunction as demanded in the complaint.

[fol. 19] In support of this motion plaintiff attaches as a part hereof the affidavit of Julius Schlezinger.

Douglas B. Maggs, Solicitor. Irving J. Levy, Associate Solicitor. Julius Schlezinger, Principal Attorney. John K. Carroll, Regional Attorney. John A. Hughes, Attorney. United States Department of Labor, Attorneys for the Plaintiff.

[fol. 20] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

Civ. 19-78

[Same Title]

AFFIDAVIT OF PLAINTIFF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

DISTRICT OF COLUMBIA,
City of Washington, ss:

Julius Schlezinger, being first duly sworn, deposes and says:

That he is a Principal Attorney of the United States Department of Labor and is authorized to exercise and perform the duties of his office as the official representative of the Chief of the Children's Bureau, United States Department of Labor, in accordance with the laws of the United States of America and the regulations of the said Department.

That this affidavit is made in support of plaintiff's motion for summary judgment for the purpose of showing that there is in this action no genuine issue as to any material fact, and that the plaintiff is entitled to judgment as a matter of law.

That all of the material facts bearing upon the issues raised by the pleadings are contained in a stipulation of facts which has been filed in this action.

Affiant, therefore, avers that the sole issue presented in this action is one of law to be determined by the court, [fol. 21] and that there is no necessity for the trial of any issues of fact.

Julius Schlezinger.

Sworn to before me this 20th day of July, 1943. Elsie E. Schwarz, Notary Public for District of Columbia, Commission Expires 2-29-48. (Seal.)

In the District Court of the United States for the Southern District of New York

Civ. 19-78

[Same Title]

Defendant's Notice of Cross-Motion For Summary Judgment

Please take notice, that the undersigned will bring the attached motion for summary judgment on for hearing before this court at Room 506, United States Courts and Post Office Building, Borough of Manhattan, City of New York, on the third day of August, 1943, at 10:30 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard.

Francis R. Stark, Vice President & General Solicitor.
Clarence W. Roberts, Assistant General Solicitor,
Attorneys for Defendant.

[fol. 22] In the District Court of the United States For the Southern District of New York

Civ. 19-78

[Same Title]

Defendant's Cross-Motion for Summary Judgment

Comes now the defendant after filing of the defendant's answer and after the pleadings are closed, and moves the court for the entry of a summary judgment on the following grounds:

1. The pleadings and admissions on file, together with the affidavit filed on behalf of the plaintiff in support of this motion, disclose no genuine issue as to any material fact.

2. All of the material facts bearing upon the issues raised by the pleadings have been stipulated and agreed to by the attorneys for the plaintiff and the attorneys for the defendant in a stipulation of facts which has been filed in this action.

3. The pleadings and admissions on file, together with the supporting affidavit filed on behalf of the plaintiff in support of its motion for summary judgment, disclose that the court may make a final disposition of this action without the necessity of a trial.

4. The pleadings and admissions on file, together with the supporting affidavit filed on behalf of the plaintiff, in support of its motion for summary judgment, show on their face that the plaintiff is not entitled to the entry of an injunction as demanded in the complaint, but that the defend-
[fol. 23] ant is entitled to a judgment dismissing the plaintiff's complaint together with costs and disbursements of the action.

In support of defendant's cross-motion for a summary judgment, refers to and makes a part of the defendant's cross-motion papers, the affidavit of Julius Schlezinger, sworn to on the 20th day of July 1943, attached to and made a part of the plaintiff's motion papers for summary judgment.

Dated: New York, N. Y., July 29, 1943.

Francis R. Stark, Clarence W. Roberts, Attorneys for Defendant, Office & P. O. Address, 60 Hudson Street, Borough of Manhattan, New York City.

To Douglas B. Maggs, Solicitor; Irving J. Levy, Associate Solicitor; Julius Schlezinger, Principal Attorney; John K. Carroll, Regional Attorney; John A. Hughes, Attorney, United States Department of Labor, Attorneys for the Plaintiff.

[fol. 24] In United States District Court, Southern District of New York

Civ. 19-78

[Same Title]

Appearances:

Douglas B. Maggs, Esq., Solicitor; Irving J. Levy, Esq., Associate Solicitor; Julius Schlezinger, Esq., Principal Attorney; John K. Carroll, Esq., Regional Attorney, John A.

Hughes, Esq., Attorney, all of United States Department of Labor, Attorneys for Plaintiff; Charles M. Joseph, Esq., of Counsel.

Francis R. Stark, Esq., Clarence W. Roberts, Esq., Attorneys for Defendant.

OPINION—Oct. 7, 1943

RIFKIND, J.:

All the facts have been stipulated and both parties move for summary judgment. Plaintiff is the Chief of the Children's Bureau of the United States Department of Labor, who is authorized, "subject to the direction and control of the Attorney General" to bring this action. Section 12(b) of the Fair Labor Standards Act of 1938.

Defendant is engaged in the transmission and delivery of telegraph messages throughout the United States and in foreign countries. Its principal office is within the Southern District of New York.

The action is to enjoin defendant from violating the provision of Section 15(a)(4) of the Fair Labor Standards [fol. 25] Act of 1938. The violations alleged are that, within the period beginning January 1, 1941, and continuing to the date of the complaint, defendant has been engaged in shipping telegraph messages in interstate commerce and in delivering telegraph messages for shipment in interstate commerce, such messages having been produced in its establishments in which oppressive child labor was employed.

The oppressive child labor was of two categories: (1) Within the period beginning January 1, 1941, and continuing to the date of the complaint, defendant employed in its establishments minors under 16 years of age; (2) within the period beginning January 1, 1942, and continuing to the date of the complaint, defendant employed in its establishments minors between 16 and 18 years of age in the occupation of motor vehicle driver.

The relevant statutory and regulatory provisions are set out in the margin.[1]

Only two questions are presented for decision. Are the activities of the defendant subject to the child labor provisions of the Act? If the answer is in the affirmative, should

[1] Footnote appears on pages 23 to 28 hereof.

injunctive relief be granted? It is the contention of defendant that it is not a "producer, manufacturer or dealer," that it does not "ship or deliver for shipment in commerce any goods." It is engaged, the defendant argues, in the transmission of ideas, whereas the statute governs only the shipment of tangible goods. Plaintiff argues that there is no such limiting language expressed in the statute and that no such limiting intention can be discovered in the policy and history of the statute.

A brief description of what actually occurs at the establishments of the defendant has been stipulated. Messages transmitted by defendant are received and delivered by the following methods: Messengers, over-the-counter, telephone and private telegraph wire. The large majority of messengers use bicycles. A smaller number perform their duties on foot. A still lesser number operate motor vehicles. [fol. 26] Over-the-counter messages are usually inscribed on a telegraph blank by the sender but, sometimes, by employees of defendant. Messages received by private telegraph wire are printed at an office of defendant on a telegraph blank or on gummed paper tape. Messages received by messenger are inscribed by the sender and carried by the messenger to an office of the defendant.

At the office where a message is received for transmission, an employee stamps it with the date and time of filing. He also notes the number of words and the class of telegraph service. If a word is illegible, or if words have been wrongly combined or broken, an employee of defendant makes the necessary correction. The stamped and corrected message is then transmitted to a message center either by means of a teleprinter operated on a telegraphic circuit or by pneumatic tube.

In the message center, each message is marked with the name or symbol of the message center to which it is to be routed. It is then distributed to the proper telegraph circuit for transmission to that message center. In most instances the message is conveyed to the designated message center from the originating message center by teleprinter, multiplex printer or Morse key. When the multiplex printer is used the message is first converted into a perforated paper which is fed into an automatic transmitter. In using either the teleprinter or the multiplex printer, the message is received in the form of symbols reprinted by a machine

at the receiving center. When the Morse key is used, the communicating signal is an audible one. An operator at the receiving center translates the audible code signals and reduces them to writing.

From the receiving message center, the messages are routed to the defendant's offices and delivered to the respective sendees by the same means by which the messages are originally received for transmission at message centers.

[fol. 27] On March 31, 1943, 11.14 per cent of defendants messengers were under 16 years of age, and 33/100 of one per cent were between 16 and 18 years of age and employed as operators of motor vehicles.

In analyzing the provisions of the Child Labor sections of the Fair Labor Standards Act, two general considerations must be observed. First, the incidence of these provisions of the statute is not aimed at those engaged in interstate commerce, nor at those who produce goods for commerce. (Cf. Sections 6 and 7 of the Act.) The statute does not prohibit the employment of child labor. The ban of the statute is against *shipment* or *delivery for shipment*, in commerce, by a producer, manufacturer or dealer of any goods produced in an establishment situated in the United States in or about which any oppressive child labor has been employed. Second, the statute establishes a national policy and a national standard of child labor. It does not constitute merely an additional sanction for the enforcement of varying state child labor laws.

Those two characteristics of the statute are the fruits of a long national debate and considerable legislative experimentation.[2]

The history of the statute is consistent only with the conclusion that Congress intended to keep the arteries of commerce free from pollution by the sweat of child labor. To accomplish this result with the least difficulty, the law prohibited the introduction into the stream of commerce, not only of the products of child labor *but of all of the products of an establishment where any child labor had been employed within 30 days.* In view of the breadth of the congressional policy, the opening hypothesis should be that the defendant is subject to the Act unless reason for lack of application is clearly shown. (I am not speaking of the burden of proof, since the case presents no issues of fact.)

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[2] Footnote appears on pages 28 to 29 hereof.

We look first to the list of exemptions enacted by Congress. Section 13(c) exempts one class of agricultural [fol. 28] employees. It further makes the law inapplicable "to any child employed as an actor in motion pictures or theatrical productions." I think I may take judicial notice of the fact that for a generation or more the employment of young messengers by the telegraph companies in the United States has been open and notorious. How simple it would have been, were such the intention of Congress, to add to Section 13(c) a few words describing them. Indeed, in another connection, messengers are expressly mentioned in Section 14. The answer to this query might be that such an express exemption would be inconsistent with the scheme of the Act which, it is asserted, deals only with tangibles; but observe the words "theatrical productions." Granted that motion picture producers manufacture tangible film, what tangible goods are produced at a theatrical production? Theatrical production can be tele-casted or televised. Manifestly Congress was unwilling to rely on the intangible character of such goods to take them out of the statutory prohibition and granted an express exemption to child actors. It gives no such explicit sanction to the employment of children as telegraph messengers.

Defendant's chief reliance is upon the "obvious and natural import of the language." U. S. *v.* Goldenberg, 1897, 168 U. S. 95, 102. Lynch v. Alworth-Stephens Co., 1925, 267 U. S. 364, 370. The words "producer" and "goods" especially when used in a context with "ship," it is contended, require a construction of the statute which limits its application to producers of goods that can be shipped, or tangible goods.

Reliance upon the common meaning of the terms employed is misplaced when Congress has enacted definitions which necessarily displace both the dictionary and common usage as authority for the meanings of the words employed. Thus, under the statute, "produced" includes "handled, or in any other manner worked on." Section 3(j). "Goods includes articles or *subjects of commerce of* [fol. 29] *any character*. Section 3(i). If only tangible goods were within the purview of the statute, what do the emphasized words add to the words "wares, products, commodities, merchandise," which precede them? Assuming that "articles of commerce" might be disregarded as no

more than a verbal flourish, usually deprived of effect by the rule of *noscitur a sociis* (Virginia *v.* Tennessee, 1893, 148 U. S. 503, 519; U. S. *v.* Baumgartner, S. D. Cal. 259 Fed. 722, 724), the insertion of "subjects of commerce" seems insistently to demand that tangibility shall not be the required attribute of the goods. The phrase "subjects of commerce" has a history which the manifest professional draftsmanship of the statute must be deemed to have recognized. In Gibbons *v.* Ogden, 1824, 9 Wheat. 1, 229, the court said:

> "Commerce, in its simplest signification, means an exchange of goods; but in the advancement of society, labour, transportation, intelligence, care, and various mediums of exchange, become commodities, and enter into commerce; the subject, the vehicle, the agent, and their various operations, become subjects of commercial regulation."

In Western Union Teleg. Co. *v.* Pendleton, 1887, 122 U. S. 347, the court indicated that the subject of the commerce of the telegraph companies was the "ideas, wishes, orders and intelligence" carried by them.

In Utah Power & Light Co. *v.* Pfost, 1932, 286 U. S. 165, 180, the court was discussing the generation and transmission of electrical energy. It reflected no hesitation in describing the process as one of "production as well as transmission of a definite supply of an article of trade." If the mysterious flow of intangible and invisible electrical energy can be described as an article of trade, I see no reason why it should lose that character when freighted with intelligence. That telegraph messages "constitute a portion of [fol. 30] commerce itself," has been said by the court in Western Union Teleg. Co. *v.* James, 1896, 162 U. S. 650, 654.

The fact that in the course of the legislative career of the statute, the phrase "articles of trade of any character" which appeared in S. 2475 (introduced in the Senate on May 24, 1937) became "articles or subjects of commerce of any character," in the bill as it passed the Senate and was accepted by the Conference Committee, can only reflect an intention to expand the coverage of the Act.

Once we reach the conclusion that the messages telegraphed by defendant are goods within the meaning of the statute, there is not much difficulty in finding that these goods are produced in the defendant's establishments.

Clearly they are "handled" and "worked on." In the light of the statutory definition, the argument that the defendant simply transmits the ideas of its customers and that it is not a producer, must fall as a matter of law. It falls also as a matter of fact, for it is the work of the defendant which transmutes the ideas of the customers into telegraphic messages by means of a series of changes and processes already described.

More troublesome is the question whether the defendant "shipped" goods in commerce. The word "ship" is not defined by the statute. Since the verb, shipped, is derived from the noun, ship, linguistic purists might limit its connotation to transportation by water. Common usage, however, has long sanctioned the use of the phrases, to ship by rail, or to ship by air, or to ship by truck. It is used synonymously with transport and convey. The defendant conveys its messages by wire. The Supreme Court has spoken of the telegraph companies as engaged in "transportation." It has called the defendant a "carrier of messages" and compared it to a railroad, as a "carrier of goods." Western Union Teleg. Co. *v.* Texas, 1881, 105 U. S. 460, 464, re- [fol. 31] ferring to Pensacola Teleg. Co. *v.* Western Union Teleg. Co., 96 U. S. 1.

I do not think that Congress intended to limit the application of the Act to the conventional modes of shipment. Its broad policy was to keep the streams of interstate commerce undefiled by the products of child labor. It is a remedial statute entitled to liberal interpretation. Missel *v.* Overnight Motor Transportation Co., C. C. A. 4, 1942, 126 Fed. (2d) 98, 103, affirmed, 316 U. S. 572. One cannot escape the prohibition of the statute by inventing a magic carpet.

Barthoiome *v.* Baltimore Fire Patrol and Despatch Co., D. Maryland, 1942, 48 Fed. Supp. 98, 102, supports the view, here rejected, that the statute deals only with tangible goods. The authority of the case has been dimmed by the rejection of its holding in Walling *v.* Sondock, C. C. A. 5, 1942, 132 Fed. (2d) 77, certiorari denied, 63 Sup. Ct. 769.

Since I have found that, within the meaning of the child labor provisions of the Act, the defendant is a producer engaged in shipping, in commerce, goods produced in establishments where oppressive child labor is employed, I must conclude that the defendant is violating the statute.

The final question is whether plaintiff is entitled to injunctive relief.

The remedy is authorized by Section 17. Against the granting of the remedy the defendant urges the argument of public policy. No one can question the imperative demand for telegraphic communication in furtherance of the war effort, both in military activity and in the production of the tools of warmaking. I accept also the proposition that public interest is a proper ingredient for consideration whenever the extraordinary remedy of injunction is sought. Here, however, we have two public interests to subserve, one suggested by defendant, the precise character of which, as well as its reach, courts can only discover in very vague [fol. 32] and general terms, and one declared by Congress, after a great national debate. Under such circumstances I hold to the view that the function of the courts is to accept the mandate of the Congress and not to blunt the thrust of its purpose with the barnacles of individual exceptions. Congress is well aware of the problems of the defendant. Only very recently it found time to authorize defendant's merger with Postal Telegraph Company. If the execution of the statutory command is an unreasonable burden upon the prosecution of the war, Congress, which has means of ascertaining all the facts, rather than the courts, should be called upon for relief. So far, however, Congress has refused to heed similar pleas from other sections of industry affected by the ameliorative measures enacted during the past decade.

Plaintiff is entitled to a decree; and upon the settlement thereof the Court will hear the parties concerning the ways and means of avoiding any interruption of defendant's business.

Decree for plaintiff.

Dated October 7, 1943.

(signed) Simon H. Rifkind, U. S. D. J.

(i) "Goods" means goods (including ships and marine equipment), wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof, but does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof.

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[1] Sec. 3. As used in this Act—

(j) "Produced" means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such em- [fol. 33] ployee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof, in any State.

(l) "Oppressive child labor" means a condition of employment under which (1) any employee under the age of sixteen years is employed by an employer (other than a parent or a person standing in place of a parent employing his own child or a child in his custody under the age of sixteen years in an occupation other than manufacturing or mining) in any occupation, or (2) any employee between the ages of sixteen and eighteen years is employed by an employer in any occupation which the Chief of the Children's Bureau in the Department of Labor shall find and by order declare to be particularly hazardous for the employment of children between such ages or detrimental to their health or well-being; but oppressive child labor shall not be deemed to exist by virtue of the employment in any occupation of any person with respect to whom the employer shall have on file an unexpired certificate issued and held pursuant to regulations of the Chief of the Children's Bureau certifying that such person is above the oppressive child-labor age. The Chief of the Children's Bureau shall provide by regulation or by order that the employment of employees between the ages of fourteen and sixteen years in occupations other than manufacturing and mining shall not be deemed to constitute oppressive child labor if and to the extent that the Chief of the Children's Bureau determines that such employment is confined to periods which will not interfere with their schooling and to conditions which will not interfere with their health and well-being.

Sec. 12. (a) After the expiration of one hundred and twenty days from the date of enactment of this Act, no producer, manufacturers, or dealer shall ship or deliver for shipment in commerce any goods produced in an establishment situated in the United States in or about which within thirty days prior to the removal of such goods therefrom any oppressive child labor has been employed: Provided, That a prosecution and conviction of a defendant for the

shipment or delivery for shipment of any goods under the [fol. 34] conditions herein prohibited shall be a bar to any further prosecution against the same defendant for shipments or deliveries for shipment of any such goods before the beginning of said prosecution.

(b) The Chief of the Children's Bureau in the Department of Labor, or any of his authorized representatives, shall make all investigations and inspections under section 11 (a) with respect to the employment of minors, and, subject to the direction and control of the Attorney General, shall bring all actions under section 17 to enjoin any act or practice which is unlawful by reason of the existence of oppressive child labor, and shall administer all other provisions of this Act relating to oppressive child labor.

Sec. 13. (c) The provisions of section 12 relating to child labor shall not apply with respect to any employee employed in agriculture while not legally required to attend school, or to any child employed as an actor in motion pictures or theatrical productions.

Sec. 15. (a) After the expiration of one hundred and twenty days from the date of enactment of this Act, it shall be unlawful for any person—

(4) to violate any of the provisions of section 12.

November 27, 1939.

CHILD LABOR REGULATIONS

Order No. 2

Occupations Particularly Hazardous for the Employment of Minors Between 16 and 18 Years of Age

Or Detrimental to Their Health or Well-Being

Sec. 422.2 *Motor-vehicle driver and helper.*—(a) *Finding of fact.*—By virtue of and pursuant to the authority conferred by section 3(1) of the Fair Labor Standards Act of 1938 and pursuant to the regulation prescribing the "Procedure Governing Determinations of Hazardous Occupations"; an investigation having been conducted with respect to the hazards for minors between 16 and 18 years [fol. 35] of age of employment in the occupations of motor-

vehicle driver and helper; a report of the investigation having been submitted to the Chief of the Children's Bureau showing that:

"1. Work on motor vehicles involves a high degree of accident risk for persons of all ages, a risk which is particularly high in the case of young persons, who are lacking in the experience and in the caution required for safety in motor-vehicle operation.

"2. Workmen's compensation experience generally shows for the occupational classifications representing motor-vehicle drivers and helpers a compensation cost higher than the average for manufacturing classifications.

"3. The opinion of experts in motor-vehicle safety and of others having practical experience in the field of motor-vehicle operation who were consulted in the course of the investigation is that employment as driver or as helper on motor vehicles is especially hazardous for young persons.

"4. Motor-vehicle drivers between 16 and 18 years of age have been found to be involved in a larger number of fatal accidents in proportion to miles driven than drivers in any older age group. In a study covering fatal accidents within a 5-year period in one State the fatal-accident rate was found to be nine times greater for 16-year-old drivers and six times greater for 17-year-old drivers than for those 45 to 50 years of age, the age group with the lowest fatal-accident rate.

"5. Under many industry codes adopted pursuant to the National Industrial Recovery Act the work of motor-vehicle drivers and helpers was listed as a hazardous occupation and as such was prohibited for minors under 18 years of age.

"6. Acting pursuant to the authority conferred upon it by the Motor Carrier Act of 1935, the Interstate Commerce Commission has established as necessary for safety a minimum age of 21 years for motor-[fol. 36] vehicle drivers, in regulations applicable to common carriers and contract carriers engaged in in-

terstate commerce. An examiner for the Commission has recommended, after investigation and public hearing, that the same minimum age for motor-vehicle drivers be applied, with certain exceptions not here material, to private carriers engaged in interstate commerce.

"7. State legislation, which reflects public recognition of the special hazards incident to the driving of motor vehicles by young persons, has established the following standards:

(a) In each of the States and the District of Columbia there is a legal minimum age for drivers of motor vehicles which is higher than that for general employment, the legal minimum age for drivers being applicable to (1) all persons operating motor vehicles, or (2) persons operating motor vehicles as employees, or (3) persons operating motor vehicles for common, contract, or private carriers.

(b) In 28 States and the District of Columbia there is a minimum age of at least 18 years applicable to (1) all persons operating motor vehicles or (2) persons operating motor vehicles as employees.

"8. A minimum age of 18 years or higher for the employment of motor-vehicle drivers and helpers has been adopted voluntarily as a general policy by many employers and by the branch of organized labor especially concerned with employment in this field";

a finding and order relating to the employment of minors between 16 and 18 years of age in the said occupations having been proposed for final adoption by the Chief of the Children's Bureau upon the basis of the said report of investigation; a public hearing having been held with respect to the said proposed finding and order; all statements submitted in connection with the said hearing having been fully considered; opportunity having been given to all interested parties to file objections within 15 days following [fol. 37] publication in the *Federal Register* of the proposed finding and order, and no objection disclosing just cause for revision thereof having been received; and sufficient reason appearing therefor,

Now, Therefore, I, Katharine F. Lenroot, Chief of the Children's Bureau of the United States Department of Labor, hereby find that the occupations of motor-vehicle driver and helper are particularly hazardous for the employment of minors between 16 and 18 years of age.

(b) *Order.*—Accordingly, I hereby declare that the occupations of motor-vehicle driver and helper are particularly hazardous for the employment of minors between 16 and 18 years of age.

Definitions. For the purpose of this order—

(1) The term "motor vehicle" shall mean any automobile, truck, truck-tractor, trailer, semi-trailer, motorcycle, or similar vehicle propelled or drawn by mechanical power and designed for use as a means of transportation but shall not include any vehicle operated exclusively on rails.

(2) The term "driver" shall mean any individual who, in the course of his employment, drives a motor vehicle at any time.

(3) The term "helper" shall mean any individual, other than a driver, whose work in connection with the transportation or delivery of goods includes riding on a motor vehicle.

This order shall not justify noncompliance with any Federal or State law or municipal ordinance establishing a higher standard than the standard established herein. This order shall become effective on January 1, 1940, and shall be in force and effect until amended or repealed by order hereafter made and published by the Chief of the Children's Bureau.

Katharine F. Lenroot, Chief of the Children's Bureau.

[fol. 38] [2] The first state minimum age law was adopted in 1848, by the State of Pennsylvania. Session Laws 1848, P. L. 278. Twelve years was the minimum established, and it was made applicable to textile factories. As industrialization expanded, awareness of the child labor problem grew. By the turn of the century, 24 States had enacted minimum age standards for various classes of activity.

History of Labor in the United States, Commons and Associates, Vol. 3, p. 404, Macmillan Company, New York, 1935. Nevertheless in 1910, nearly two million children, between the ages of 10 and 16, 18 per cent of the total number of children in that age group, were gainfully employed. Child Labor: Facts and Figures, Publication 197, Revised, Children's Bureau, U. S. Department of Labor, 1933, pp. 2, 70-71.

Congressional attempts to deal with child labor nationally began with the introduction of bills in 1906. It was 10 years, however, before Congress enacted the first Federal Child Labor Law, 39 Stat. 675, C. 432, which extended only to factories, manufacturing establishments, canneries, workshops, mines and quarries. This law was declared unconstitutional. Hammer *v.* Dagenhart, 1918, 247 U. S. 251. Congress immediately thereafter made an attempt to regulate child labor by the use of the taxation power. 40 Stat. 1138, C. 18. This, too, was declared unconstitutional by the Supreme Court. Bailey *v.* Drexel Furniture Co., 1922, 259 U. S. 20. In 1924, Congress submitted to the States, for ratification, a proposed amendment to the Constitution, authorizing Congress "to limit, regulate and prohibit the labor of persons under 18 years of age." It has been ratified by 28 States.

Under the National Industrial Recovery Act, 576 Codes were adopted, each of them containing minimum age provisions. After Schechter Poultry Corp. *v.* U. S., 1935, 295 U. S. 495, which declared that Act unconstitutional, the number of children leaving school for work sharply increased. Trend of Child Labor 1927-1936, Monthly Labor Review, December 1937, page 1375, published by the United States Department of Labor.

The legislative history of the child labor provisions of the Fair Labor Standards Act began with a message from [fol. 39] the President to the Congress on May 24, 1937, Senate Report 884, 75th Congress, First Session. Senator Black and Congressman Connery, on the same day, introduced identical bills which were to become the Fair Labor Standards Act, S. 2475, H. R. 7200. The bills made unlawful the shipment into any State of goods to be sold or used contrary to the laws of that State. It thus followed the model of the Convict Made Goods Act, 49 Stat. 494, and of the pre-prohibition attempts to deal with the liquor traffic.

In other respects the child labor provisions were tied in with the provisions regulating wages and hours.

Organizations interested in child-labor legislation appeared before the committees of Congress and urged the vesting of child labor regulation in the Children's Bureau, coverage on an establishment rather than on an employee basis to facilitate enforcement, and the adoption of a uniform national age minimum. These proposals provoked wide divergence of opinion and division between the two Houses. These differences were not resolved until a conference committee reported the bill in the form in which it was enacted. See S. 2475, Section 23(e), 75th Congress, First Session, as reported to the Senate; 81 Congressional Record, pages 7949 to 7951; S. 2475, Section 10(a) and Section 10(b), 75th Congress, Third Session, as reported to the House, April 21, 1938; 82 Congressional Record, page 1780; Conference Report No. 2738, House of Representatives, 75th Congress, Third Session, to accompany S. 2475, June 11, 1938, page 32.

This Act was held constitutional, and Hammer *v.* Dagenhart, overruled, in U. S. *v.* Darby, 1941, 312 U. S. 100.

[fol. 40] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

Civ. 19-78

[Same Title]

JUDGMENT

Motions having regularly been made by both parties, each for summary judgment in his favor and against the other, on the ground that there is no genuine issue as to any material fact,

And having read the complaint, answer, stipulation of facts, plaintiff's motion for summary judgment and affidavit in support thereof, and defendant's cross-motion for summary judgment in its favor and in opposition to said motion of plaintiff, and having heard Julius Schlezinger, Esquire, attorney for plaintiff and Clarence W. Roberts, Esquire, attorney for defendant, and due deliberation having been had, it is

Ordered, adjudged and decreed that plaintiff's motion for summary judgment be, and hereby is, granted, and that defendant's motion for summary judgment be, and, hereby is, denied.

Now, therefore, on motion of the attorneys for the plaintiff, it is hereby

Ordered, adjudged and decreed that defendant, its officers, agents, servants, employees, attorneys, and all persons acting or claiming to act in its behalf and interest be and they hereby are permanently enjoined and restrained from violating the provisions of Section 15(a)(4) of the [fol. 41] Fair Labor Standards Act of 1938 (Act of June 25, 1938, c. 676, 52 Stat. 1060, U. S. C., Title 29, Sec. 201, et seq.), hereinafter referred to as the Act, in any of the following manners:

Transmitting in interstate commerce or delivering for transmission in interstate commerce or in any other manner shipping in interstate commerce or delivering for shipment in interstate commerce telegraph or other messages or any other goods produced by or for defendant or under its direction in any establishment or establishments in the United States in or about which within thirty (30) days prior to the transmission or other removal of such messages or other goods therefrom, there shall have been employed, suffered or permitted to work on or after the date hereof any oppressive child labor, as defined in the Act, to-wit:

(1) Any employee under the age of 16 years in any occupation; or

(2) Any employee between the ages of 16 and 18 years in any occupation which the Chief of the Children's Bureau of the United States Department of Labor, pursuant to Section 3(1) of the Act, has by order declared, or may hereafter by order declare, to be particularly hazardous for the employment of children between such ages or detrimental to their health or well-being:

Provided, that the employment of employees between the ages of 14 and 16 years shall not be deemed to constitute oppressive child labor if and to the extent that the Chief of the Children's Bureau, by regulation or order, pursuant to Section 3(1) of the

Act, determines that such employment is confined to periods which will not interfere with their schooling and to conditions which will not interfere with their [fol. 42] health and well-being, and, upon motion of the attorneys for Defendant, it is

Further ordered, adjudged and decreed, provided Defendant serves and files its Notice of Appeal, from this Judgment, and Transcript of record within thirty (30) days from the date hereof, that this Judgment shall be suspended for a period of ninety (90) days from the date of the entry hereof, or until a decision of the defendant's appeal is handed down by the United States Circuit Court of Appeals for the Second Circuit, if that event takes place before the expiration of the said ninety (90) days, and it is

Further ordered, adjudged and decreed that costs be assessed against the defendant.

Dated this 15th day of November, 1943.

(Signed) Simon H. Rifkind, United States District Judge.

In District Court of the United States, Southern District of New York

Civ. 19-78

[Same Title]

Notice of Appeal

Notice is hereby given that The Western Union Telegraph Company, the defendant above named, hereby appeals to the Circuit Court of Appeals for the Second Circuit, from [fol. 43] the final judgment entered in this action on the 16th day of November, 1943; except from the portion thereof which suspends the judgment for a period of ninety days from the date thereof.

Dated, New York, November 17, 1943.

Francis R. Stark, Clarence W. Roberts, Attorneys for Defendant, Office & Post Office Address, 60 Hudson Street, Borough of Manhattan, New York. 13, N. Y.

To: Douglas B. Maggs, Solicitor; Irving J. Levy, Associate Solicitor; Julius Schlezinger, Principal Attorney; John K. Carroll, Regional Attorney; John A. Hughes, Attorney, United States Department of Labor, Attorneys for Plaintiff, Office & Post Office Address: John K. Carroll, Regional Attorney, United States Department of Labor, 341 Ninth Avenue, New York, 1, N. Y., and Office of the Solicitor, United States Department of Labor, Washington, D. C.

To: Clerk of the United States District Court, Southern District of New York.

[fol. 44] In United States District Court, Southern District of New York

Civ. 19-78

[Same Title]

Stipulation as to Record

It is hereby stipulated and agreed, by and between the attorneys for the respective parties hereto, that the foregoing is a true transcript of the record of the District Court of the United States for the Southern District of New York in the above entitled action, as agreed upon by the parties.

Dated: New York, N. Y., December 10th, 1943.

Douglas B. Maggs, Solicitor; Irving J. Levy, Associate Solicitor; Julius Schlezinger, Principal Attorney; John K. Carroll, Regional Attorney; John A. Hughes, Attorney, United States Department of Labor, Attorneys for Plaintiff. Francis R. Stark, Clarence W. Roberts, Attorneys for Defendant.

[fol. 45] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 46] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, OCTOBER TERM, 1943

No. 247

(Argued February 4, 1944. Decided March 3, 1944)

KATHARINE F. LENROOT, Appellee,

v.

WESTERN UNION TELEGRAPH COMPANY, Appellant

Before Learned Hand, Augustus N. Hand and Frank, Circuit Judges

Appeal from a summary judgment of the District Court for the Southern District of New York, enjoining the defendant from violating the provisions of § 212(a) of Title 29, U. S. Code, by using messengers under the age of sixteen years, and motorcar drivers between the ages of sixteen and eighteen, in the transmission of telegrams.

Francis R. Stark, for the appellant.

Archibald Cox, for the appellee.

L. HAND, *Circuit Judge:*

The defendant appeals from an injunction, forbidding it to violate § 212(a) of Title 29, U. S. Code, by using messengers under sixteen, or motorcar drivers between sixteen [fol. 47] and eighteen in transmitting telegrams. Both parties agree that the employment in question is within the meaning of "oppressive child labor" in § 203(1) of Title 29, U. S. Code, and as defined by § 422.2 of Chapter 4, Title 29 of the Code of Federal Regulations; but the defendant maintains that the act does not apply to its business. The case was tried upon stipulated facts, most of which it is not necessary to state, as the general nature of the defendant's business is so well understood. All that we need say is that over eleven percent of the telegraph messengers employed by the defendant are under sixteen years of age, and that a small percentage of its motorcar drivers are between sixteen and eighteen. Both sides moved for summary judgment, since the outcome depended altogether upon the meaning of the statute; and

the judge, believing defendant to be within it, granted judgment for the plaintiff. We do not understand that the defendant disputes that it is engaged in interstate commerce; at any rate there can be no doubt that it is. *Telegraph Co.* v. *Texas*, 105 U. S. 460; *Western Union Telegraph Co.* v. *Pendleton*, 122 U. S. 347; *Western Union Telegraph Co.* v. *James*, 162 U. S. 650. Thus, Congress could unquestionably have forbidden the employment of the messengers and drivers here in question, if it had wished. That does not, however, answer the question whether § 212(a) covers the business; and it does not do so, unless the defendant is a "producer" of "goods" which it "ships" in interstate commerce. While it is of course true that, taken in their colloquial sense, these words do not apply to its activities, they should not be so taken, for the statute has made its own definitions in § 203. Subdivision i of that section reads as follows: " 'Goods' means goods • • • wares, products, commodities, merchandise or articles or subjects of commerce of any character." (Originally the words, "or subjects," were absent; they were added in the Senate Committee on Education and Labor.) [fol. 48] subdivision j reads: " 'Produced' means produced, manufactured, mined, handled, or in any other manner worked on."

In order to learn whether the defendant's business falls within the section so defined, we must consider exactly what steps sending a telegram comprises. Ordinarily, it is true, the sender thinks of the telegram as the actual transmission of his words to the addressee; and so he speaks of "sending" it and of its being "delivered," as though the same thing had left him, passed to the addressee's home or office and was there handed to him. Indeed, the defendant itself uses that very argument in order to bring itself within the exception in § 215(a)(1) which exempts common carriers from the act as to any goods not produced by them. It does no more, it says, than transport to the addressee intangible objects—the sender's words transformed into electric impulses; it "produces" no "goods," even though we read those words with their definitions. We might indeed agree, if the defendant did no more than carry written messages between the parties; conceivably the same might even be true, if it only provided means—like a telephone—by which the parties could communicate, though these con-

sisted of pulsations of an electric current. But neither of these is what the defendant does. The sender either writes out his message on paper and delivers it to one of the defendant's messengers, or delievers it himself at one of the defendant's offices; or he dictates or telephones it to an employee at an office, who takes it down on paper in shorthand, or types it. The message so received never leaves that office; the addressee never sees it. Another employee—or perhaps the same one—either uses it as a text for pressing a key in suitable dots and dashes, having a conventional significance to him and to another employee at the opposite end of a wire; or as a text for manipulating some other suitable device—like a "teletype"—by which equivalent movements will appear upon a similar device at the end of [fol. 49] a wire. In either case nothing can be said to be "sent" between the office except pulsations of electrical current, which are not only not the sender's message, but would be totally incomprehensible to him or to the addressee, if either could perceive them. When these have been transmitted, they are either translated, if they are in code, or transcribed, if they are not; and the message so resulting is delivered either by messenger or by telephone to the addressee. From the foregoing it is at once apparent that there is not the least similarity between what the defendant does and the transportation of goods by a common carrier. It is also apparent that the defendant's activities are within the definition of "produced" in subdivision j of § 203; for, not only does it "handle" the sender's message, but it "works on" it, first, by changing it into something wholly different, and then by changing it back to a form like the original.

The only remaining question is whether the defendant "ships" any "goods." First, are there any "goods" concerned? To prove that there are the plaintiff relies upon the phrase, "subjects of commerce of any character" in subdivision i; to which the defendant answers that we must judge that phrase by its context, which necessarily limits its meaning to "tangible" objects. It is here that the Senate amendment becomes important. Until that was made the subdivision had read: "wares, products, commodities, merchandise or articles of commerce of any character." So far as we can see, no more complete enumeration could have been made of every kind of "tangible";

so that, when the Senate expanded the phrase to include, not only "articles" of commerce, but "subjects" of commerce, the opposition would have meant nothing, if it had not included "intangibles." Moreover, not only had all kinds of "tangibles" been already included, but "subjects of commerce" was not a good description of "tangibles." Its introduction into a phrase which had been sufficient to [fol. 50] include all kinds of "tangibles," cannot be set down to tautology, or slovenly draughting; it demands that some additional significance be added. We need not with the plaintiff resort to opinions such as those of Johnson, *J.*, in *Gibbons* v. *Ogden*, 9 Wheat. 229-30, in which the transmission of "intelligence" is spoken of as a "subject" of commerce. It is enough that we have unmistakable evidence of a purpose to extend the definition of subdivision i to everything which had been considered a "subject of commerce": that is, to whatever Congress could regulate as such a subject. Last, we have to say whether, assuming that a message received for transmission is "goods," and that the defendant "produces" it, it also "ships" the message, when it sends the pulsations over the telegraph wires. Although that is indeed an inappropriate word to apply to "intangibles," its unfitness for the most part disappears, once we treat messages as "goods." Certainly we should stultify ourselves, having gone so far, if we were to refuse to understand it as covering what is here involved.

So much for textual analysis. The defendant also argues that, aside from any verbal correspondence which can be spelled out between the section and its business, § 212(a) as a whole, and particularly the contrast between it and §§ 206 and 207, show that Congress did not mean to forbid the use of child labor when an employer was merely engaged in interstate commerce, but only in case he was engaged in shipping goods in commerce; in other words, that § 212(a) covers only those who are not engaged in interstate commerce. No reason is suggested for such a capricious limitation upon a purpose which was apparently pervasive; and the curious result would be that Congress singled out the more vulnerable of its powers for exercise, for in 1938, *Hammer* v. *Dagenhart*, 247 U. S. 251, had not yet been overruled. If it is right we must suppose that Congress meant to control the passage across state lines of goods

[fol. 51] made in a state under conditions which it disapproved—a power which at that time was still in doubt—but did not mean to regulate the conduct of interstate commerce in goods—a power which it had always incontestibly had. Moreover, there is no basis for the argument in the statute itself, for the contrast between the language of § 212(a) and of §§ 206 and 207, does not justify the inference made from it. The act was a compromise of two quite separate designs: that of the House, which was to regulate child labor by national standards; that of the Senate, which was to prevent one state from breaking down the standards of another by unregulated competition. The House won, and it would leave its plan in large part unrealized to omit child labor in interstate commerce—to say nothing of the fact that such commerce, and the shipment in commerce of goods made by child labor, are not inevitably mutually exclusive. *Fleming* v. *A. B. Kirschbaum Co.*, 124 Fed. (2) 567, 571, 572 n. 5 (C. C. A. 3), affirmed 316 U. S. 517.

The difference in language can be otherwise accounted for. The original scheme of the House was to give to the Secretary of Labor power to declare what industries "affected" interstate commerce. That was to be a condition upon both the child labor provisions, and wages and hours regulation. It had nothing to do with interstate commerce which was to be regulated anyway, without any action by the Secretary. The House plan was amended, however, changing the definition in §§ 206 and 207 to the phrase, "production of goods for commerce," which the courts were to construe without any aid from the Secretary. Section 212—then § 10—as originally proposed, contained two subdivisions: subdivision a being the same as it now is, and subdivision b containing the phrase, "engaged in commerce in any industry affecting commerce." That was the form also of §§ 206 and 207 during the period while the Secretary was to declare what industries did "affect [fol. 52] commerce." Subdivision b was deleted, because, as the Conference Report declared, the power given to the Secretary in section 6 of the House amendment had been taken away in Conference. That was perhaps a good reason for not retaining the phrase, "in any industry affecting commerce"; but it must be admitted that it is not clear why subdivison a was not amended to conform to §§ 206

and 207. Nevertheless, that gives us no ground for inferring that subdivision a was supposed to be more limited than §§ 206 and 207 in their amended form; verbally, as we have seen, it covers the situation at bar; and the reason given for deleting subdivision b suffices to show that Congress had no such purpose as the defendant imputes to it.

The defendant's arguments based upon the well-known canons of statutory interpretations we have not disregarded; but it is not necessary to say more than that, whatever their weight, they do not in our judgment overbear the construction we have adopted.

Judgment affirmed.

[fol. 53] UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 20th day of March, one thousand nine hundred and forty-four.

Present: Hon. Learned Hand, Hon. Augustus N. Hand, Hon. Jerome N. Frank, Circuit Judges.

KATHARINE F. LENROOT, Plaintiff-Appellee,

v.

THE WESTERN UNION TELEGRAPH COMPANY, Defendant-Appellant

Appeal from the District Court of the United States for the Southern District of New York

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

Alexander M. Bell, Clerk.

[fol. 54] [Endorsed:] United States Circuit Court of Appeals, Second Circuit. Katharine F. Lenroot, v. Western Union Telegraph Company. Order for Mandate. United States Circuit Court of Appeals: Second Circuit. Filed Mar. 20, 1944. Alexander M. Bell, Clerk.

[fol. 55] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 56] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed May 8, 1944

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 48,340. U. S. Circuit Court of Appeals, Second Circuit. Term No. 49. The Western Union Telegraph Company, Petitioner, vs. Katharine F. Lenroot, Chief of the Children's Bureau, United States Department of Labor. Petition for a writ of certiorari and exhibit thereto. Filed April 5, 1944. Term No. 49, O. T. 1944.

FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

No. [redacted]. 49

THE WESTERN UNION TELEGRAPH COMPANY,
Petitioner,

against

KATHARINE F. LENROOT, Chief of the Children's Bureau, United States Department of Labor.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, AND BRIEF IN SUPPORT THEREOF

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AUTHORITIES

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1943

No.

THE WESTERN UNION TELEGRAPH COMPANY,
Petitioner,
vs.
KATHARINE F. LENROOT, Chief of the Children's Bureau, United States Department of Labor.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

TO THE HONORABLE THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The above named petitioner respectfully prays that a writ of certiorari issue to review the decision of the United States circuit court of appeals for the second circuit handed down on March 3, 1944.

Jurisdiction

The jurisdiction of this court is invoked under section 24 (a) of the Judicial Code, as amended by the Act of February 3, 1925 (28 U. S. C. A., Sec. 347).

Opinions Below

The opinion of the district court for the southern district of New York is reported in 52 Fed. Supp. 142, but is also set forth in full in the record (pp. 24-37).

The opinion of the circuit court of appeals for the second circuit affirming the judgment of the district court was handed down March 3, 1944 and is not officially reported, but is set forth in full in the record.

Question Presented

The question presented is: Do the child labor provisions of the Fair Labor Standards Act apply to telegraph companies?

In construing the act, the courts below have answered that question in the affirmative.

Statutes Involved

The statutes involved are set forth in Appendix A to the accompanying brief.

Statement of the Case

Petitioner, which will now be referred to as Western Union, asks this court to review a decision of the circuit court of appeals for the second circuit, affirming a judgment (R. 40-42) of the district court for the southern district of New York, which enjoins Western Union from sending or delivering any interstate messages* for thirty days at

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* Not, as mistakenly stated by the court of appeals, from violating the act "by using messengers under sixteen", etc. The injunction is against "transmitting in interstate commerce or delivering for transmission in interstate commerce * * * telegraph or other messages * * * produced by or for defendant * * * in any establishment * * * in or about which within thirty days prior to the transmission * * * of such messages * * * there shall have been employed any employee under the age of sixteen years * * * ". R. folios 121-2.

least, and longer than that unless Western Union stops employing messengers under sixteen.

Nobody, we assume, certainly not the court or the plaintiff, expects or desires the injunction to be obeyed.

The real question is whether Congress, by the child labor provisions of the Fair Labor Standards Act, intended to compel Western Union to stop employing such messengers.

The framers of the House bill undoubtedly did so intend. The first twenty prints of the bill contained a specific prohibition of all child labor in commerce.* There is no dispute that this provision would have prevented the employment of fifteen-year-old telegraph messengers. But Congress refused to enact it, and the bill came out of Congress without any prohibition of child labor at all. The plaintiff's position is that she does not know why Congress refused to prohibit it. The circuit court says it does not know why.** But we urge that when the powerful and forceful organization which sponsored this child labor legislation drafts a prohibition and urges its adoption on Congress and Congress leaves it out, there can be only one explanation as to what Congress intended. The omission was not due to inadvertence, as plaintiff, in her brief in the court of

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* Section 10b of the House bill, as it went to conference, read:

> "No employer engaged in commerce in any industry affecting commerce shall employ any employee under any oppressive child labor conditions" (House Report 2738, 75th Congress, 3rd Session, page 24).

** The court says: "It must be admitted that it is not clear * * * " etc. The court also says that it was the design of the House to regulate child labor by national standards, and of the Senate to prevent one State from breaking down the standards of another by unregulated competition, and that "the House won". The House won as to wages and hours, but it certainly did not win as to the prohibition of child labor in commerce, which the conference committee, following the Senate bill, left out.

appeals (p. 23), was driven to suggest, or to bashfulness. It was because Congress did not think that particular thing should be nationally prohibited. Whatever its reason,* the intent of Congress that it should not be nationally prohibited is clear.

This court has said that the history of this legislation leaves no doubt that Congress chose not to enter areas that it might have occupied. *Kirschbaum* v. *Walling*, 316 U. S. 517, 522 (1942). It seems to be the position of the plaintiff, and the court seems to sustain it,** that the act should be construed and administered on the assumption that Congress, to the limit of its constitutional power, intended to make effective the prohibition which it refused to enact. Technically this result was reached in the following remarkable way:

There was another child labor provision in the bill which Congress did enact. This section provided that no "producer", manufacturer, or dealer should "ship" in commerce any "goods" produced (not by child labor, but) in any establishment where child labor had been employed within thirty days. "Goods" are defined as including all subjects of commerce; "produced" is defined to include "handling * * * or in any other manner working on" goods; but "ship" is not defined and is used in its natural sense. Notwithstanding which the plaintiff contended and the courts below have held that a telegraph company violates this prohibition if it employs child labor, because telegrams by the definition are goods, the telegraph company by the definition is a producer, and most astonishing of all the telegraph company without benefit of any artificial definition "ships" its telegrams in commerce.

Obviously the framers of the bill did not intend this second prohibition to apply to telegraph companies or to other service operations of public utilities not producing and selling subjects of commerce for consumption in com-

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* We think the reason is plain enough. Brief, pp. 12, 19.

** See brief, p. 18.

petition with rival producers. Employment of child labor by such utilities in commerce was taken care of in the House bill* by the prohibition first mentioned (which was not enacted). If both prohibitions had been enacted Western Union could have been convicted for violating the first mentioned, but no one would have dreamed of suggesting that a second count in the indictment for violation of the prohibition against shipping goods could have been sustained. It is clear from the legislative history that the prohibition as to the shipment of goods was intended by Congress to mean what the framers of the bill meant by it, and nothing more. *The intention was to prevent the channels of interstate trade from being used to secure a competitive advantage to producers who employed child labor over their rivals who refrained from employing such labor, either voluntarily or because of the strict child labor laws of their particular States.* See *U. S.* v. *Darby*, 312 U. S. 100, referred to in the brief (p. 13).

There was no national declaration of policy in the act with respect to child labor. Congress did not prohibit child labor either in commerce or in the production of goods for commerce, and did not declare that the channels of commerce were to be regarded as "polluted" by either. Goods produced by child labor are not banned from commerce like lottery tickets; they may be shipped in commerce under the same conditions as any other goods produced in the same establishment: thirty days after the child labor ceases. Goods produced by employees whose wages or hours have violated the prohibitions in the Act cannot, on the contrary, be shipped in commerce at all, sec. 15(a)(1). Except to prevent competitive advantage in interstate trade, the regulation of child labor, like the regulation of divorce,

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* The Senate bill as passed did not prohibit any child labor, or define any child labor as "oppressive," or include it in the definition of "substandard" labor conditions. Conference Report (No. 2738, 75th Congress, 3d Session) p. 13 et seq.

was purposely and deliberately left by Congress where it was before, in the several States, over the opposition of those who contended that it should be governed by a national, uniform rule.

In the accompanying brief we shall show shortly that, apart from the clear intent of Congress not to cover this subject by a Federal rule, the words used would be wholly inappropriate to express a contrary intention. The prohibition has penal as well as civil sanctions. No reasonable group of men operating a telegraph enterprise could possibly have anticipated, on reading these words, that their traditional method of operation must be changed. Nor, on the civil side, could Congress possibly have intended to authorize a court to put the Western Union completely out of business for thirty days.

It will be shown, shortly, that telegrams are not goods, that a telegraph company is not a producer, and that telegrams are not and cannot be shipped, in commerce or otherwise.

Reasons for Granting the Writ

The decision below is wrong, and the question is of public importance in connection with the construction and administration of the act. It is important that the rights of the State and the family should be preserved and not superseded where Congress has evidenced its intention to preserve them. It is also important to correct the error because of its harmful effect on the telegraph company's part in the war effort. The court will take judicial notice that there is a manpower shortage which is seriously affecting the national telegraph service as well as other industries, and the latest report of the Federal Communications Commission to the Board of War Communications, excerpts from which are attached to the brief, shows that the bottleneck which is most difficult to overcome, and which has been growing worse instead of better, is due to the shortage of messengers. All messengers are hard to get and keep; there

is less difficulty with messengers of fifteen, not because the pay is less, for that is subject to the same minimum, but because after sixteen the boys are attracted to the war industries, with whose inflated wage scales the telegraph company, which has not been allowed a general rate increase for more than twenty-five years, can only with difficulty compete. If forbidden to fill the gaps in the ranks with younger boys the present delays will be accentuated and prolonged.

If for no other reason the case should be reviewed because of the form of the judgment. An injunction which neither the plaintiff nor the court could possibly permit to be obeyed must be erroneous.

For all these reasons the case presents an important question of Federal law which has not been, but should be, settled by this court.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

No.

THE WESTERN UNION TELEGRAPH COMPANY,
Petitioner,
vs.
KATHARINE F. LENROOT, Chief of the Children's Bureau, United States Department of Labor.

BRIEF IN SUPPORT OF PETITION

Statement

The Fair Labor Standards Act was passed June 14, 1938. Western Union, which operates in all the States, necessarily employs many thousands of telegraph messengers, and a considerable proportion of them are under sixteen. There appeared to be no doubt that the child labor provisions of the Act were not intended to apply to telegraph companies, and accordingly no change was made by Western Union in its practice in this respect. Four years after the passage of the Act, in August 1942, the plaintiff brought this civil suit to enjoin Western Union from violating the Act.

The following quotation from the opinion of the circuit court of appeals summarizes the facts accurately and fully enough for all present purposes:

> "The case was tried upon stipulated facts, most of which it is not necessary to state, as the general

nature of the defendant's business is so well understood. All that we need say is that over eleven percent of the telegraph messengers employed by the defendant are under sixteen years of age, and that a small percentage of its motorcar drivers are between sixteen and eighteen. Both sides moved for summary judgment, since the outcome depended altogether upon the meaning of the statute; and the judge, believing defendant to be within it, granted judgment for the plaintiff.

* * * * * *

"The sender either writes out his message on paper and delivers it to one of the defendant's messengers, or delivers it himself at one of the defendant's offices; or he dictates or telephones it to an employee at an office, who takes it down on paper in shorthand, or types it. The message so received never leaves that office; the addressee never sees it. Another employee—or perhaps the same one—either uses it as a text for pressing a key in suitable dots and dashes, having a conventional significance to him and to another employee at the opposite end of a wire; or as a text for manipulating some other suitable device—like a 'teletype'—by which equivalent movements will appear upon a similar device at the end of a wire. In either case nothing can be said to be 'sent' between the offices except pulsations of electrical current, which are not only not the sender's message, but would be totally incomprehensible to him or to the addressee, if either could perceive them. When these have been transmitted, they are either translated, if they are in code, or transcribed, if they are not; and the message so resulting is delivered either by messenger or by telephone to the addressee. From the foregoing it is at once apparent that there is not the least similarity between what the defendant does and the transportation of goods by a common carrier".

Specifications of Error Relied On

The circuit court of appeals erred in holding:

1. That Congress, by the child labor provisions of the Fair Labor Standards Act, intended to require telegraph companies to stop employing messengers under sixteen.

2. That telegrams are "goods" within the meaning of that act.

3. That a telegraph company is a "producer" within the meaning of that act.

4. That telegrams are "shipped" in commerce within the meaning of that act.

5. That Western Union should be enjoined from sending or delivering interstate telegrams for thirty days.

ARGUMENT

Except to equalize competition in interstate trade it was the intent of Congress to leave the employment of child labor to regulation by the States.

The plaintiff conceded on the argument and the court concedes in its opinion that equalizing competition was the purpose of the Senate. The court says that "the House won". But so far as child labor was concerned, the only difference between the Senate and the House bills was that the House bill prohibited it and the Senate bill did not. Since the conference committee left out the prohibition and Congress passed the bill without it the statement that the House won—on this point—is the reverse of the truth. The task of a conference committee usually involves compromise. The House carried its main point as to wages and hours, but the Senate prevailed as to child labor.

Before the bill was introduced child labor was a family matter, subject to regulation by the States but by no one else. The attempt of the framers of the House bill to induce Congress to make it the subject of a uniform national rule (except to the extent of equalizing competition in interstate trade) failed. There was no declaration of any national policy on the subject. The Act defines "oppressive" child labor, in substance, as any child labor which the Children's Bureau does not approve, but no national policy can be established by a disagreeable word in a definition. The Senate conferees, who presumably opposed any national prohibition of child labor, were no doubt glad to concede the epithet in exchange for no prohibition (Paris is worth a Mass)*; and in the House the definition had been geared to the theory of that bill, which did contain the prohibition, so that the definition had been appropriate. At any rate, when the Act came out of Congress with no prohibition of child labor, the extent to which such labor is to be permitted was clearly left, as it was before, to the family and to local laws.

Western Union did not contend, as the circuit court of appeals in its opinion seems to imply, that if the prohibition which Congress did adopt with respect to the shipment of goods produced in establishments which employed child labor fairly applied, the violator could escape its effect by showing that he was engaged in commerce. But we did contend that if Congress had meant to include such companies as ours it would have enacted the prohibition against child labor in commerce and not left its intent to be tortured out of a prohibition obviously intended solely to eliminate unfairness in interstate competition between sellers of consumer goods.

For the wage and hour provisions of the act, besides the straight prohibitions of substandard pay and hours, con-

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*There was no such definition in the Senate bill when it went to conference.

tained the same prohibition* with respect to the shipment of goods which alone of the child labor provisions survived the action of Congress. And as to the meaning and scope of that prohibition this court has said (italics ours):

> "Section 15(a)(1) prohibits, and the indictment charges, the shipment in interstate commerce of goods produced for interstate commerce by employees whose wages and hours of employment do not conform to the requirements of the act. Since this section is not violated unless the *commodity shipped* has been produced under labor conditions prohibited by section 6 and section 7, the only question arising under the commerce clause with respect to such shipments is whether Congress has the constitutional power to prohibit them. * * * The motive and purpose of the present regulation are plainly to make effective the congressional conception of public policy that *interstate commerce should not be made the instrument of competition in the distribution of goods produced under substandard labor conditions*, which competition is injurious to the commerce and to the States from and to which the commerce flows * * *. As we have said the evils aimed at by the act are the spread of substandard labor conditions through the use of the facilities of interstate commerce for *competition by the goods so produced with those produced under the prescribed or better labor conditions* * * *. Congress, to obtain its objective in the suppression of nation-wide *competition* in interstate commerce by goods produced under substandard labor conditions, has made no distinction as to the volume or amount of shipments * * *".
>
> *U. S.* v. *Darby*, 312 U. S. 100, 115, 122, 123 (1941).

Suppose Congress had stricken out not only the prohibition against child labor in commerce, but also the prohibitions against substandard wages and hours, and had merely

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* Except that such goods were barred from commerce forever, while child-labor-establishment goods, whether produced by child labor or not, could be shipped in thirty days if the child labor ceased.

defined substandard wages and hours and provided that no producer, manufacturer or dealer should ship in commerce any goods produced in an establishment where substandard wages and hours prevailed. Would anyone argue that the act in that form would have applied to the wages and hours of telegraph employees? Yet as to child labor that is all that there is in the Act.

Telegrams are not "goods"

No one would suppose that they were except for the artificial definition:

> "'Goods' means goods (including ships and marine equipment), wares, products, commodities, merchandise, or articles or *subjects of commerce* of any character, or any *part or ingredient thereof*, but does not include goods after their delivery into the actual physical *possession of the ultimate consumer* thereof other than a producer, manufacturer, or processor thereof".

The argument is that telegrams come under this definition because they are "subjects of commerce", and of course they are. But what "goods" Congress meant must be determined not only from the definition but from the nature of the prohibition and the object which was to be accomplished. The goods with which Congress was concerned were goods (1) with parts or ingredients; (2) which are to be delivered into the actual physical possession of a consumer; and (3) which in their nature are susceptible of being shipped. A subject of commerce which fulfills none of these requirements may be goods, but cannot be the sort of goods which Congress had in mind.

We insist on no distinction between tangible and intangible subjects of commerce. It may well be that the insertion of "subjects of commerce of any character" was intended to make it clear that the prohibition applied to intangibles as well as tangibles. We do not dispute that the production and sale of gas or power would come within the

act. But it is plain that *what Congress had in mind was some res, tangible or intangible, which is produced, transported and sold to be consumed, in competition or potential competition with other sales of similar products.* Only in that way can the clear intention of Congress to prohibit only competitive advantages in interstate trade be realized.

A telegraph company is not a producer

It is not contended that Western Union is a manufacturer or dealer. It comes within the act if it is a producer or not at all. No one would say that it is a producer except for the artificial definition:

> "'Produced' means * * * in any * * * manner worked on * * *; and * * * an employee shall be deemed to have been engaged in the production of goods if such employee was employed in * * * handling, transporting or in any other manner working on such goods * * *".

But this definition must be read against a background of common sense. That it cannot mean literally what it says in all cases is evident. Section 15 (a)(1) provides that:

> "No provision of this act shall impose any liability upon any common carrier for the transportation in commerce in the regular course of its business of any *goods not produced by such common carrier* * * *".

If everyone who handles goods is a producer, every carload of freight handled by a railroad company is produced by the railroad company, and there could therefore be no such thing as freight which the railroad company did not "produce", and consequently no exemption. More absurd still: if a railroad company employed child labor in its establishment no goods "produced" in its establishment (which includes all goods handled by it, by the literal terms of the definition) could be shipped in commerce for thirty days, and an injunction closing down the operations

of the railroad, like this injunction closing down the operations of the telegraph company, would be authorized.

It is perfectly evident what the meaning and scope of the definition must be. It was intended to take care of the ordinary case in which A manufactures material and gives it to B to process or package in order to put it in merchantable condition. Without the definition B would say that the goods were not produced by him. The function of the definition is to preclude that claim.

A telegraph company does not "ship" its telegrams

There is no artificial definition of "ship". The word is used in its natural sense. A telegraph company is not a carrier, *Primrose* v. *Western Union*, 154 U. S. 1. In the ninety years of Western Union's existence no statute aimed at carriers has ever been held to include telegraph companies except where they are specifically mentioned by name. The Mann-Elkins amendment to the Interstate Commerce Act of 1910* brought telegraph companies for the first time under the jurisdiction of the Interstate Commerce Commission by providing that they should be "deemed to be common carriers for the purposes of this act", and "for the purposes of" the Communications Act they are defined conveniently as carriers, without changing their status as it was under the act of 1910. They are not carriers, either common carriers or contract carriers, for any other purpose. Telegrams are transmitted, never shipped. Even the physical piece of paper containing the message, which may move in commerce from the last telegraph office to the addressee, cannot possibly be said to be *shipped* in commerce. A person not a carrier transporting his own property across a State line or otherwise does indeed transport it but certainly does not ship it. If Congress had actually intended to include telegraph messengers in the act, a court should require more appro-

* 36 Stat. 539.

priate language than this before applying criminal sanctions, or the civil sanction of complete interruption of the industry. Before the lower courts spoke no counsel could reasonably have advised a telegraph executive that this language applied to him, nor could a reasonable executive have believed his counsel if he had been so advised.

Neither district court nor circuit court of appeals gave any reason for the conclusion that telegrams are "shipped".

The district court (Judge Rifkind) found this question "troublesome". But he was still under the impression, wholly erroneous as we have seen, that the broad policy of the act, as it finally passed, was the same as the policy of the framers of the House bill, namely, "to keep the streams of interstate commerce undefiled by the products of child labor" (R. fol. 91). He admits that "ship" is not the proper word, and erroneously states that this court has held that telegraph companies are engaged in "transportation" (fol. 90)*. Ship, he says, is the correct word with respect to movements by rail, by air or by truck (fol. 90); and so, without more, he leaps to the conclusion:

> "I do not think that Congress intended to *limit* the application of the act to the conventional modes of shipment" (fol. 91).

The court of appeals gave only one reason for concluding that telegrams are shipped. The circuit court of appeals for the second circuit is a great court, and is usually right. They realized that this point was essential to the judgment. It must be assumed that the reason they gave—the only reason they gave—was the best one they could think of. We record that reason in the court's own words and we respectfully urge that it is not a good one:

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* The court of appeals says that "there is not the least similarity between what the defendant does and the transportation of goods by a common carrier."

> "Last, we have to say whether, assuming that a message received for transmission is 'goods,' and that the defendant 'produces' it, it also 'ships' the message, when it sends the pulsations over the telegraph wires. Although that is indeed an inappropriate word to apply to 'intangibles,' its unfitness for the most part disappears, once we treat messages as 'goods.' Certainly we should stultify ourselves, having gone so far, if we were to refuse to understand it as covering what is here involved."

The court had indeed gone far, but it should never be too late for repentance.

Plaintiff's argument as to why child labor was not prohibited.

Plaintiff's brief in the court of appeals said:

> "Prior to the conference report every print of the bill except one prohibited the employment of oppressive child labor in commerce * * *. There was no such provision it is true in the form in which the bill first passed the Senate, but this exception is not material for present purposes because it proceeded on the theory, later rejected, that Congress should not set its own standards for child labor but should merely supplement State laws by prohibiting interstate sales of goods made by children under conditions outlawed by the State of destination (81 Congressional Record 7949-7951). Opinion was apparently unanimous that *if Congress was to set a single national minimum standard* it should do so both for the production of goods for commerce and for commerce itself" (pages 20-21). (Italics ours.)

The "apparently" is the plaintiff's. There is no supporting authority or reference. The Senate decided not to set a national child-labor standard for commerce. The conference committee sustained the Senate. We cannot suppose that the managers on the part of the House were asleep or indifferent; nor can we accept the suggestion that the omission of the prohibition which the House desired

and the Senate did not was due to "inadvertence" on the part of the conference committee, as plaintiff's brief suggested on page 23. Even if it was inadvertence, a national policy cannot be established by an inadvertent failure to declare it.

The conference committee did not, it is true, state expressly that omitting the child-labor prohibition was a concession by the House to the Senate. The conference report says that the omission of the prohibition was "in view of the omission from the conference agreement of the principle of section 6 of the House amendment"—which left it to the Secretary of Labor to determine what industries affected commerce. But since there was no prohibition in the Senate bill, and this prohibition in the House bill was omitted, and since the House had prevailed over the Senate in connection with wages and hours, the fact that a compromise took place is evident. It is the more evident when it is recalled that the original Senate bill had contained all the child labor prohibitions, that it had been reported favorably by the Senate Committee on Education and Labor, and that the Senate nevertheless struck out the prohibition of child labor in commerce. It will not be claimed that this was inadvertent. It may fairly be assumed, therefore, that the Senate conferees were insisting on the Senate's policy in this respect as opposed to the policy of the House.

The importance of the question to the telegraph company's share in the war effort.

The increase, because of war conditions, in the traffic load which must be handled by telegraph is a matter of common knowledge. So is the manpower shortage which makes it impossible to handle the additional load with prewar speed. There is no lack of adequate facilities. So far as operators are concerned, they are being trained in great numbers and good progress has been made with respect to speed of service in transmission from office to office by wire. But the messenger shortage still persists and has

even been growing worse instead of better. Excerpts from the report of the Federal Communications Commission to the Board of War Communications for the month of January 1944 are attached (Appendix B).

Of the telegraph traffic handled by Western Union in 1943 probably over seventy percent consisted of messages for the Government or for essential war industries. Western Union itself is of course an essential war industry. If the law does not require it, our efforts should not be handicapped by requiring any depletion of the present messenger force or prohibiting replacements or additions to it from boys of fifteen who are not yet eligible to earn the higher wages offered by war plants.

Conclusion

Certiorari should be granted.

Respectfully submitted,

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Appendix A

APPLICABLE PROVISIONS OF THE FAIR LABOR STANDARDS ACT OF 1938 (52 Stat. 1060)

Section 15a-4 (29 U. S. C. A. Section 215a-4) prohibits the violation of "any of the provisions of Section 12" (29 U. S. C. A. Section 212), the operative words of which are (italics ours):

> * * * No producer, manufacturer or dealer shall *ship* or deliver for *shipment* in commerce any *goods produced* in an *establishment* situated in the United States, in or about which, within thirty days prior to the removal of such *goods* therefrom, any oppressive child labor has been employed; * * *. (Section 12a; 29 U. S. C. A. Section 212a)
>
> Sec. 3 (i). "Goods" means goods (including ships and marine equipment), wares, products, commodities, merchandise, or articles or *subjects of commerce of any character*, or *any part or ingredient thereof*, but does not include goods after their delivery into the *actual physical possession of the ultimate consumer* thereof other than a producer, manufacturer, or processor thereof.
>
> Sec. 3 (j). "Produced" means produced, manufactured, mined, *handled, or in any other manner worked on* in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, *handling, transporting, or in any other manner working on* such goods, or in any process or occupation necessary to the production thereof, in any State.
>
> Sec. 3 (l). "Oppressive child labor" means a condition of employment under which (1) any employee under the age of sixteen years is employed by an employer (other than a parent or a person standing in place of a parent employing his own child or a child in his custody under the age of sixteen years in an occupation other than manufacturing

or mining) in any occupation, or (2) any employee between the ages of sixteen and eighteen years is employed by an employer in any occupation which the Chief of the Children's Bureau in the Department of Labor shall find and by order declare to be particularly hazardous for the employment of children between such ages or detrimental to their health or well-being;" * * *. (29 U. S. C. A. Section 203)

Sec. 15. No provision of this act shall impose any liability upon any common carrier for the transportation in commerce in the regular course of its business of *any goods not produced by such common carrier*, and no provisions of this act shall excuse any common carrier from its obligation to accept any goods for transportation. * * *. (29 U. S. C. A. Section 215).

Sec. 17. The district courts of the United States and the United States courts of the Territories and possessions shall have jurisdiction, for cause shown, and subject to the provisions of section 20 (relating to notice to opposite party) of the Act entitled 'An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes', approved October 15, 1914, as amended (U. S. C., 1934 edition, Title 28, sec. 381), to restrain violations of section 215 of this title (29 U. S. C. A. § 217).

Appendix B

REPORT OF FEDERAL COMMUNICATIONS COMMISSION January, 1944 to the Board of War Communications on telegraph service made pursuant to Board Order #25-C (Pages 22-25)

"SECTION V—TERMINAL OFFICE SERVICE

As noted in the September 1943 Report, the terminal office speed of service study required under the Commission's Order measures the performance of delivery offices by reference to the percentage of business routes sent out for delivery within certain specified intervals from the time of receipt of the oldest message in each route at the delivery office. The interval measured takes into account not only the routing time, or elapsed time at the delivery desk, but the entire elapsed time at the delivery office. Allowing two minutes for the handlings within the delivery office prior to the receipt at the delivery desk, which the Commission felt was adequate, and adding to that two minates the established routing time of ten minutes for business messages to be delivered within one mile of the office, delivery office performance was measured in the September Report in the light of the ability of the offices to send out 85 percent of their business routes within 12 minutes.

In the case of the Western Union study commented upon in the September Report,[5] only 9 of the 24 cities reporting

[5] The delivery office speed of service studies at Postal offices were discontinued after the merger of the two companies because the messenger operations of the large majority of the Postal offices were merged with those of the Western Union delivery offices. The former Postal offices continuing independent messenger delivery operations after the merger are to be included in the Western Union study after a period not to exceed 60 days following the merger, during which time these Postal offices will be instructed in the Western Union speed of service procedure to be thereafter followed at those offices in making the study prescribed by Commission Order No. 113.

were able to dispatch 85 percent or more of such routes within 12 minutes during June, which was regarded as unsatisfactory service. That the terminal office service of succeeding months has further deteriorated, however, can be seen from the following table showing the number of cities in which 85 percent or more of the business routes were dispatched within 12 minutes:

Month	*Number of cities in which 85% or more of business routes for delivery within one mile of the office were dispatched within 12 minutes*
June	9
July	7
August	7
September	4
October	5
November	4

In a number of cities each month less than 50 percent of the business routes were dispatched within 12 minutes. These cities are set forth in the table below:

Month	*Cities reporting less than 50% of their business routes dispatched for delivery within one mile of the office within 12 minutes*
June	Baltimore (49.5%): Detroit (41.6%): San Francisco (49.1%)
July	Dallas (47.9%): St. Louis (45.9%)
August	Detroit (37.5%): San Francisco (47.7%)
September	Buffalo (42.8%): Dallas (43.2%): Detroit (11.5%): New York (44%)
October	Denver (36%): Detroit (18.6%): New York (41.5%): St. Louis (48.7%)
November	Detroit (31.8%): Miami (31.5%): New York (40.1%)

It will be noted that Detroit reported the poorest terminal office handling of any city, sending out only 41.6 percent of its business routes within 12 minutes during June, 37.5 percent in August, 11.5 percent in September, 18.6 percent in October and 31.8 percent in November.

• • •

While the month of September is ordinarily a critical month in messenger turnover because many messengers leave the employ of the telegraph company to return to school or to accept positions in other industries vacated by persons returning to school, the performance statistics reported for terminal office handling during the past six months represent, in general, very unsatisfactory service. While message center office speed of service has improved in the past five months, as shown in Sections III and IV of this report, the poor messenger delivery service reported during the same period would indicate that any improvement in message center performance has been offset, insofar as messages requiring messenger delivery are concerned, by the deterioration that has taken place in the speed of terminal office handling rendered by delivery offices.

The delivery office performance statistics demonstrate that at present one of the most fruitful means of speedily raising the level of telegraph service generally lies in improving the prompt dispatch of messages from delivery offices."

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

No. 49

THE WESTERN UNION TELEGRAPH COMPANY,
Petitioner,

vs.

KATHARINE F. LENROOT, Chief of the Children's Bureau, United States Department of Labor,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONER

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Opinions Below

The opinion of the circuit court of appeals (R. 34) is reported in 141 F. (2d) 400. The opinion of the district court (R. 16) is reported in 52 F. Supp. 142.

Jurisdiction

The opinion of the circuit court of appeals was handed down March 3, 1944 (R. 34) and the judgment was entered March 20, 1944. (R. 39) The petition for certiorari was filed April 5, 1944 and was granted May 8, 1944. (R. 41)

The jurisdiction of the court is invoked under section 240 (a) of the Judicial Code, as amended by the act of February 13, 1925 (28 U. S. C. A. section 347).

Questions Presented

Do the child labor provisions of the Fair Labor Standards Act apply to telegraph companies? Specifically, may a telegraph company which employs messengers under sixteen to pick up and deliver telegrams in the ordinary course of its business be enjoined from transmitting any interstate or foreign messages until thirty days after such employment has ceased?

Statutes Involved

The statutes involved are set forth in the Appendix to this brief.

Statement of the Case

The Fair Labor Standards Act was passed June 14, 1938. Petitioner, which will be referred to as Western Union, operates in all the States and necessarily employs many thousands of telegraph messengers. Many of these messengers are and many always have been under sixteen. The ratio changes from day to day, but as of March 31, 1943 the proportion of messengers under sixteen was 11.14 per cent (R. 11-12). Some messengers under eighteen have been employed to drive motor vehicles while picking up or delivering telegrams, which employment is "oppressive" child labor under child labor order No. 2.* The proportion of these to the total number of messengers was, as of March 31, 1944, .33 of one per cent (R. 12).

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* Title 29, chapter 4, Code of Federal Regulations, part 422, section 422.2 (R. 25-28).

Western Union's position has always been that the child labor provisions of the act were not intended to apply to telegraph companies, and accordingly the enactment of the act made no difference in its practices with respect to the employment of messengers. Four years after the passage of the act, in August 1942, the plaintiff brought this civil suit, claiming that Western Union was violating the act by transmitting messages in commerce while employing child labor, and seeking an injunction (not against the employment of the child labor, to which plaintiff concedes that she is not entitled, but) against continuing to transmit the messages.

Both sides moved for summary judgment. Plaintiff's motion was granted by the district court (Judge RIFKIND) and the judgment affirmed by the circuit court of appeals.

The Prohibition Which Western Union Is Supposed to Have Violated

The act does not prohibit the employment of child labor in commerce. It provides that:

> "* * * no producer * * * shall ship or deliver for shipment in commerce any goods produced in an establishment * * * in or about which, within thirty days prior to the removal of such goods therefrom, any oppressive child labor has been employed; * * *" (section 12a; 29 U. S. CA section 212a.)

The employment of messengers under sixteen, and the employment of motor messengers under eighteen, are "oppressive child labor" within the definition of the act. The defendant's position is that it is not a producer, that its messages are not goods, and that in any event they cannot be said to be shipped in commerce.

Nature of the Telegraph Business

The facts were stipulated (R. 6-12) and there is no dispute about any of them or any of the inferences from them. The nature of the telegraph business is so well known, and it has been so frequently considered by this court, that it is probably superfluous to make any extended statement about the facts, or to burden the court with record references to them. The statement as to the facts in the opinion of the circuit court of appeals (R. 36), while not entirely accurate in all respects, is sufficiently so for the purposes of this discussion; but it may be convenient to summarize them very briefly:

The sending of a telegram is a short story, and like all good short stories it has a beginning, a middle and an end. The beginning is when the message is accepted by the telegraph company for transmission and delivery; the middle is the transmission of the thought, or idea, or intelligence contained in the message by means of electrical impulses from the telegraph office of origin to the telegraph office of destination; the end is when the thought, idea or intelligence is delivered or communicated to the addressee.

The beginning: messages are given to a telegraph company (in telegraph language "filed" at the telegraph office of origin) in various ways. The sender or his agent may hand the written message across the counter to a telegraph clerk; he may send it to the telegraph office by one of the company's messengers, summoned by a signal sent over a call-box circuit or by telephone; he may telephone it directly to the telegraph office, where it is received and written down or typewritten by an agent of the company; or if he has a private wire connecting his office with the telegraph office (a "pony" wire, or "tie-line") the sender's operator may transmit the message by Morse or printer over this private wire and it will be received in the telegraph office by an operator employed by the company who makes a written or typewritten copy of it; or the copy in the tele-

graph office may be made by a printing telegraph machine (teleprinter or teletypewriter). Whatever method is employed the first written or printed or typewritten copy of the message to appear in the telegraph office of origin is the *original message*, which the telegraph company is required by law to preserve for a definite time, and which determines what it is that the telegraph company assumes the obligation to transmit and deliver. The physical piece of paper on which this message is written does not move from place to place, but is retained in the telegraph office of origin.

The middle: the thought, idea or intelligence contained in the original message is communicated (in telegraph language "sent" or "transmitted") by electrical impulses passing over a wire or circuit to the telegraph office of destination, or to one or more intervening telegraph offices known as "relay" offices. It may be sent by a Morse operator, making and breaking the electric contact by elevating and depressing a key, and received at the next office by a Morse operator reading the message by sound from the short and long clicks (dots and dashes) proceeding from the sounder. Or the sending operator may operate a "printer", as one operates a typewriter, and the message may be received at the next office by a corresponding mechanical device which prints it on a blank or a tape. Or the message may be translated at the sending office into symbols or "pulses" represented by perforations on a tape, and the tape may be fed into an automatic sending machine, coming out of a corresponding automatic receiving machine at the other end, also on a tape. If it is necessary to relay the message at more than one intervening office, the operation is repeated at each such office. The copy of the message at each such office is known as that office's "relay copy". Like the original message these relay copies do not move, but remain in the respective relay offices.

The end: when the message reaches the telegraph office of destination—the nearest office to the addressee—the copy

made at that office, in any of the various ways described, whether by hand, by printer, or on a tape, is delivered or communicated to the addressee in various ways corresponding to the ways in which the original message may reach the office of origin. The normal procedure is to take the received copy, written on a receiving blank (or cut and pasted on a receiving blank if it comes in by tape), enclose it in a sealed envelope and send it to the addressee's place of business or residence by messenger. It may however be read to the addressee over the telephone, or transmitted to him by pony wire or tie-line; or if he has so instructed it may be held at the telegraph office until the addressee calls for it. But the normal method is delivery by messenger. This received copy of the message, which a messenger carries for a distance varying from a few yards to a mile or more and hands to the addressee, is the only one of all the physical pieces of paper on which the message is copied in the various stages of its transmission which has the property of motion. Except in very rare instances, as where the office of destination is in a city through which a State line runs and the telegraph office is on one side of the line and the addressee on the other, this piece of paper does not move across State lines. Nothing in connection with the message moves across State lines normally except the electrical impulses into which the message is converted at each office which sends it and out of which it is reconverted at each office which receives it.

Thus it is seen that no physical thing is entrusted to the telegraph company by the sender, to be preserved in specie by the company and in specie delivered to the addressee. The thing entrusted to the telegraph company by the sender, which is to be preserved by the company unchanged and communicated to the addressee, is the thought, idea or intelligence contained in the message; and this is something which, apart from any artificial definitions, and according to the ordinary meaning of language, is produced by the sender and not produced by the telegraph company at all.

Specifications of Error Relied On

The circuit court of appeals erred in holding:

1. That Congress, by the child labor provisions of the Fair Labor Standards Act, intended to require telegraph companies to stop employing messengers under sixteen.

2. That telegrams are "goods" within the meaning of that act.

3. That a telegraph company is a "producer" within the meaning of that act.

4. That telegrams are "shipped" in commerce within the meaning of that act.

5. That Western Union should be enjoined from sending or delivering interstate telegrams for thirty days.

ARGUMENT

I

Although urged to do so Congress refused to declare any national policy with respect to child labor, to prohibit child labor in commerce, or to supersede state regulation with any uniform national rule; it decided merely to renew its earlier attempt to prevent the use of child labor from resulting in unfair competitive advantage in interstate trade.

In 1937 the child labor Amendment had failed of ratification, and was believed by many to be dead or at least in extremis. At any rate, if it was still alive, there was no prospect of its early ratification.

Advocates of the Amendment therefore sought legislation from Congress which would have the effect of putting

an end to child labor to the full extent of the power of Congress under the Constitution without the Amendment, and perhaps a little beyond. Their reasons and motives were well known. Opponents of the Amendment were also opposed to such an extension of national regulation into that field, for the same reasons in general which had led them to oppose the Amendment. Their attitude and these reasons were equally well known.[1] The debates on the subject had been heated, and had been conducted on a nation-wide scale, for more than fourteen years.

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[1] For convenience the principal reasons advanced may be summarized (the references are to back issues of the NEW YORK TIMES, available in bound form at the Columbia University School of Journalism):

Unjustifiable interference with rights of States, which have not been neglectful of their obligations:

May 30, 1924, page 30, col. 3, SENATOR WADSWORTH of New York;

August 18, 1924, page 16, col. 3, JAMES A. EMERY, General Counsel, National Association of Manufacturers;

December 5, 1924, page 13, col. 1, New York State Chamber of Commerce;

December 12, 1924, page 39, col. 1, GOVERNOR MCLEOD of South Carolina.

Unnecessary to clothe the Federal Government with such immense powers; dread of further increase of power of already top-heavy Federal government; would tend toward centralized bureaucratic control:

Nov. 22, 1924, page 20, col. 1, National Grange;

Feb. 1, 1925, page 24, col. 1, JOSEPH T. CASHMAN, Esq., of the New York Bar, in debate at National Republican Club;

Feb. 6, 1925, page 14, col. 1, LOUIS MARSHALL, Esq., in debate at Women's National Republican Club;

Oct. 12, 1926, page 2, col. 6, SENATOR WADSWORTH of New York, explaining vote against ratification;

Oct. 30, 1926, page 5, col. 3, MR. EMERY, Counsel of National Association of Manufacturers: "no justification for the demand and the national Legislature is not fitted for the task of meeting a local problem in terms of local conditions".

The Democratic Platform of 1936

No doubt because of the divergence of views within as well as without the party, the platform contained no promise of any national prohibition of child labor. All that was said was this:

> **"We know that droughts, dust storms, floods, minimum wages, maximum hours, child labor and working conditions in industry, monopolistic and unfair business practices cannot be adequately handled exclusively by forty-eight separate State legislatures**

Unjustifiable interference with rights of parents:
Dec. 7, 1924, page 19, col. 2, NICHOLAS MURRAY BUTLER.
Detrimental to youth and real hardship to farmers:
Nov. 13, 1924, page 24, col. 1, National Grange opposes amendment.

In *"The Federal Child Labor Amendment"* by WILLIAM D. GUTHRIE, Esq. (New York, April 1934), it is pointed out that every State in the Union has legislated on the subject of child labor, and that "Such legislation varies as local self-government will inevitably vary throughout the United States because of climate, public policy, standards of living, resources, living costs, prevailing wage scales, taxes, etc."; and there are many quotations from statesmen in and out of Congress who had indicated their strong opposition to abolishing these variations and imposing a uniform national rule.

In his companion pamphlet *"The Child Labor Amendment"* (New York, March 1934), he quotes the following colloquy from a Senate debate on May 31, 1924:

> "SENATOR KING of Utah: Of course, it is obvious that under the guise of the amendment they will in time take charge of children the same as the bolsheviks are doing in Russia and control not only their labor and their education, but after a time determine whether they shall receive religious instruction or not, the same as the bolsheviks do in Russia. * * *
>
> "SENATOR REED of Missouri: * * * Something has been said today about some manufacturers being against it. I would like to ask him what he knows about people being in favor of the pending measure who believe in the Russian bolshevik idea of the State taking charge of the children?
>
> "MR. KING: If the Senator from Delaware will pardon me, every bolshevik * * * in the United States is back of the measure."

> * * *. Transactions and activities which inevitably overflow State boundaries call for both State and Federal treatment.
>
> "We have sought and will continue to seek to meet these problems with legislation within the Constitution. If these problems cannot be effectively solved by legislation within the Constitution, we shall seek such clarifying amendment as will assure to the legislatures of the several States and the Congress of the United States, each within its proper jurisdiction, the power to enact those la[illegible]hich the State and Federal legislatures, wit[illegible]ective spheres, shall find necessa[illegible]

The President's Message of May 24, 1937

The President said that the time had arrived to take further action to extend the frontiers of social progress which, he said, had in actual practice "been effectively advanced only by the passage of laws by State legislatures or the national Congress". He did indeed say that "A self-supporting and self-respecting democracy can plead no justification for the existence of child labor"; but he did not recommend or suggest that Congress, as distinguished from the State legislatures, should undertake to deal with that subject by a uniform national prohibition. On the contrary his recommendation with respect to child labor was strictly limited:

> "Nearly twenty years ago in his dissenting opinion in *Hammer* v. *Dagenhart*, Mr. Justice HOLMES expressed his views as to the power of Congress to prohibit the shipment in interstate or foreign commerce of the products of the labor of children in factories. * * * A majority of the Supreme Court, however, decided five to four against Mr. Justice HOLMES. * * * But although Mr. Justice HOLMES spoke for a minority of the Supreme Court he spoke for a majority of the American people. * * * Congress cannot interfere in local affairs, but when goods pass through the channels of commerce from one State to

another they become subject to the power of Congress, and Congress may exercise that power to organize and protect the fundamental interests of free labor. And so to protect the fundamental interests of free labor and a free people we propose that only goods which have been produced under conditions which meet the minimum standards of free labor shall be admitted to interstate commerce. * * * There should be no difficulty in ruling out the products of the labor of children from any fair market."

Legislative History of the Child Labor Provisions of the Fair Labor Standards Act

Companion bills, known as the Black-Connery bills, were simultaneously introduced in the Senate and the House in May 1937, promptly after the receipt of the President's message. These bills commenced with a "legislative declaration" that the employment of workers under sub-standard labor conditions burdened and obstructed commerce and led to labor disputes obstructing the free flow of goods in commerce. "Sub-standard labor condition" was defined as including a condition of employment at sub-standard wages or for a sub-standard work week, or in which "oppressive child labor exists". Any goods in the production of which employees had been employed under any sub-standard labor condition were "unfair goods". The bills prohibited the shipment in commerce of any unfair goods, and prohibited the employment in commerce or in the production of goods intended for transportation or sale in commerce of any person under any sub-standard labor condition (section 7).

It will be noted that so far as child labor is concerned these bills dealt with the subject in three ways: (1) by legislative declarations that child labor threatened obstructions to commerce; (2) by a direct prohibition of the employment of child labor in commerce, and (3) by a prohibition of the shipment in commerce of goods produced by child labor. As will be seen, in the act as finally passed only (3) survived.

The Action of the Senate on the Black Bill

The Senate acted first. On July 6 (calendar day July 8), 1937 Mr. BLACK, from the Committee on Education and Labor, reported favorably on the bill, which was S 2475, with certain amendments not now material, and recommended that it do pass. However, the Senate Committee on Interstate Commerce, of which Senator WHEELER was Chairman, had been conducting for some time an exhaustive investigation into the subject of child labor, and in that connection had considered six different bills and had held lengthy hearings on the subject. Senator WHEELER said:

> "We heard representatives of the different churches, representatives of the Episcopal Church, I think of the Methodist Church, of the Jewish race, and of the Catholic denomination. We heard representatives of the brotherhoods and representatives of the employers. We finally worked out a bill which was satisfactory to practically everybody except the Children's Bureau."[2]

The bill on which the Interstate Commerce Committee had agreed, and which it had recommended for passage,[3] was S 2226, "regulating the products of child labor in interstate commerce". Like the Black bill it prohibited the shipment in commerce of goods produced by child labor; but unlike the Black bill it contained no prohibition of the employment of child labor in commerce. When the vote was taken on the passage of the Black bill on July 31, 1937 Senator JOHNSON moved that it be amended to strike therefrom all provisions relating to child labor, and that the Wheeler-Johnson bill (S 2226) as amended by the Committee on Interstate Commerce be inserted at the end of section 23 of the Black bill (S 2475).[4] This amendment

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[2] Cong. Rec. July 31, 1937. Vol. 81, Part 7, pages 7930-7931.

[3] Senate Report No. 726, 75th Congress, 1st Session.

[4] Cong. Rec. Vol. 81, Part 7, pages 7949-7950.

was agreed to by the Senate (yeas 57, nays 28, not voting 10).[5] The Senate rejected a motion to recommit the bill to the Committee on Education and Labor,[6] and the bill was then passed.[7]

The Senate bill as passed not only contained no prohibition of child labor in commerce but contained no legislative declaration that child labor threatened to burden or obstruct commerce. The language of the legislative declaration was not changed; it was still declared that the employment of workers under sub-standard labor conditions burdened and obstructed commerce; but in the definition of "sub-standard labor condition" the reference to child labor is omitted and the term is narrowed to include only wages and hours.

Action of the House

The House struck out all the provisions of the Senate bill after the enacting clause and substituted its own bill, which was the original Connery bill with numerous amendments. Mrs. NORTON, Chairman of the Labor Committee, stated that these amendments numbered 159.[8] On December 17, 1937 it was recommitted to the House Labor Committee, redrafted by that committee, but denied a rule by the Rules Committee.[9] On May 23, 1938 the Rules Committee was discharged from further consideration of the bill,[10] a House motion to recommit the bill was lost,[11] and the bill as thus redrafted was then passed by the House (May 24) and sent to the Senate as an amendment to the Senate bill.[12]

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[5] Cong. Rec. Vol. 81, Part 7, pages 7949-7951.
[6] Cong. Rec. Vol. 81, Part 7, page 7954.
[7] Cong. Rec. Vol. 81, Part 7, page 7957.
[8] Cong. Rec. Vol. 82, Part 2, page 1829.
Cong. Rec. Vol. 83, Part 7, pages 7275, 7279.
[9] Cong. Rec. Vol. 82, Part 2, pages 1829, 1835.
Cong. Rec. Vol. 83, Part 7, page 7275.
[10] Cong. Rec. Vol. 83, Part 7, pages 7274-7279.
[11] Cong. Rec. Vol. 83, Part 7, page 7449.
[12] Cong. Rec. Vol. 83, Part 7, page 7450.

The Senate refused to agree to the House amendment and asked for a conference,[13] which was agreed to.[14]

As passed by the House the bill still contained the prohibition against child labor in commerce and the prohibition against shipment in commerce of child-labor goods, expanded now to include all goods produced in an establishment where child labor had been employed within thirty days, whether child labor had been employed in the production of the specific goods or not; but although the finding and declaration of policy still recited that sub-standard labor conditions burdened and obstructed commerce there was no longer any definition of sub-standard labor conditions, so that although child labor in commerce was prohibited there was nothing which directly hooked up this prohibition with the finding and declaration of policy.

The Conference Report

Meanwhile the Senate, to emphasize its determination to enact into law its own views on the subject of child labor, passed the Wheeler-Johnson bill, S 2226, as it had been recommended by the Interstate Commerce Committee, as a separate measure on August 19, 1937.[15] The Conference Committee wrote a compromise bill which was passed by both houses without further amendment.[16] The results, so far as child labor was concerned, were these:

(1) The finding and declaration of policy omitted all reference to sub-standard labor conditions, and did not

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[13] Cong. Rec. Vol. 83, Part 7, page 7560.

[14] Cong. Rec. Vol. 83, Part 7, page 7770.

[15] Cong. Rec. Vol. 81, Part 8, page 9320. Senator WHEELER said: "I may say that this bill passed the Senate by a very large majority as an amendment to the wage and hour bill. The wage and hour bill is now tied up in some committee in the House; and the bill in question, to regulate interstate commerce in the products of child labor, should, it seems to me, be passed." Vol. 81, Part 8, page 9318.

[16] Cong. Rec. Vol. 83, Part 8, pages 9178, 9267.

mention child labor. Congress declared that commerce was burdened and obstructed by

> "the existence, in industries engaged in commerce or the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers."

(2) The prohibition of child labor in commerce, on which the House was insisting and which the Senate had refused to enact, was left out.

(3) The Senate, not being confident that *Hammer* v. *Dagenhart*, 247 U. S. 251 (1918), would be overruled,[17] sought to hedge against the possibility that it might not be by providing for the branding of products of child labor when shipped in commerce and for their subjection to the laws of the States of destination even in the original package. The House, considerably influenced no doubt by the opinion of Attorney General JACKSON, was confident that *Hammer* v. *Dagenhart* would be overruled, and thought these precautions unnecessary. The Senate bill, instead of prohibiting the shipment in commerce of all goods produced in an establishment where child labor was employed, which it was thought might be unconstitutional, merely created a presumption that goods produced in a child-labor establishment were themselves produced by child labor.[18] With

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[17] "Thus, in the judgment of the committee, too much hope could not be practically entertained that the Supreme Court would overrule the *Hammer* v. *Dagenhart* case at this time". Report of Committee on Interstate Commerce on S 2226 (the Wheeler-Johnson bill); Senate Report No. 726, 75th Congress, 1st Session.

[18] The report of the Interstate Commerce Committee on S 2226, *supra*, said: "Because S 2345 absolutely denied the uses of interstate commerce facilities for goods which demonstrably are not tainted by child labor, though they may have been produced by a concern employing in some department thereof child labor, a problem of constitutional law is raised (*Tyson and Bros.* v. *Banton*, 273 U. S. 418, 1927; and *Adams* v. *Tanner*, 244 U. S. 590, 1917) which S 2226 avoids."

respect to these matters the Conference Committee apparently thought that the Senate's fears were groundless, and adopted the provisions of the House bill. This is evidently what the Conference Report meant when it stated, under the head of "Child Labor Provisions", that the conference agreement "adopts the child labor provisions of the House amendment, with one exception". The one exception was the prohibition of child labor in commerce.

Reasons Why Senate Refused to Agree to a Prohibition of Child Labor in Commerce

Perhaps the reasons are not material. The issue was squarely raised. The House to the last continued to contend for the prohibition; the record shows that the Senate, from the day of the first vote on the Black bill, refused to have it and consistently adhered to the refusal. The Conference Committee sustained the Senate; both houses passed the bill recommended in the Conference Report, and the intention of the Senate, whatever the reasons for it, indisputably became the intention of Congress.

Furthermore, whatever the reasons, and even if it could be assumed, contrary to the record, that the omission of this provision was an inadvertence, a national policy cannot be established by an inadvertent failure to declare it.

But there was certainly no inadvertence. The story is not told by the discussion on the floor of the Senate immediately preceding the enactment of the bill on July 31, 1937. It is found in the minutes of the hearings before the Committee on Interstate Commerce on S 592, S 1976, S 2068, S 2226 and S 2345, 75th Congress, 1st Session (1937)—that is, the hearings on the Wheeler-Johnson bill and its companion bills. At those hearings representatives of labor insisted that the legislation contemplated "is not to be compared with a direct prohibition of the employment of children under sixteen years of age in industrial establish-

ments * * *" (page 182; and see also page 171; pages 77, 124).

The plaintiff's position below was that she does not know why Congress refused to enact this prohibition. The circuit court of appeals says that it does not know.[19] We suggest that there were at least four reasons why a majority could not be obtained in the Senate to vote for the prohibition:

First Reason:

The constitutional difficulty

The report of the Interstate Commerce Committee on the Wheeler-Johnson bill, S 2226,[20] said that "precedent definitely labels the direct prohibition approach as unconstitutional" (page 3). However the matter may stand today, there was certainly nothing frivolous about such a belief in 1937. While Congress had been frequently sustained in prohibiting the shipment of this or that commodity in commerce, any direct attempt to interfere with the employer-employee relation had been sustained, as against objection under the Fifth Amendment, only when the regulation bore some reasonable relation to safety,

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[19] The court says: "It must be admitted that it is not clear * * *" etc. (R. 38-39).

[20] Senate Report 726, 75th Congress, 1st Session. Senator BARKLEY said during the hearings: "I think all we can do is to prohibit the shipment in interstate commerce of child-made goods, but that does not deal with the large quantities of goods that may be made in the States, over which we have no jurisdiction without the Amendment." There was much discussion of the possibility of prohibiting child labor except under work permits to be issued by Federal authority. Senator LONERGAN said (page 77): "It is only through a constitutional amendment that we can deal effectively with this subject"; the Chairman said (page 124): "There is this question under any Federal law, in my judgment, without a constitutional amendment, and that is, as to whether or not the courts would uphold the provisions giving the Federal Government the right to issue any work permit. I think that would be questioned." (Minutes of the Committee Hearings, page 15.)

economy or efficiency.[21] Economy here was out. The "general welfare" was out.[22] There had been no history of strikes or other labor disturbances, actual or threatened, by reason of child labor, and it may well have seemed that Congress could not, without stultifying itself, find as a fact that child labor had any tendency to burden or obstruct commerce by interruptions. At any rate the finding to this effect in the original Black-Connery bills was omitted in the bill that passed the Senate, modified out of all recognition in the bill that passed the House, and did not appear at all in the act which finally went through. In the absence of any such finding it might well have been supposed in 1938 if not today that a prohibition of all child labor in commerce was beyond the power of Congress.

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[21] The first Hours of Service of Railway Employees Act was sustained on the ground of safety, *MK&T Railroad* v. *U. S.*, 231 U. S. 112 (1913). So as to the Safety Appliance Act, and the second Employer's Liability Act, 223 U. S. 1 (1912). The Labor Board Cases, 301 U. S. 1-148 (April 12, 1937) sustained the Wagner Act as tending to prevent interruptions to commerce: even the editorial writers of the Associated Press were held properly included in the act for that reason: "We think, however, it is obvious that strikes or labor disturbances among this class of employees would have as direct an effect upon the activities of the petitioner as similar disturbances amongst those who operate the teletype machines or as a strike amongst the employees of telegraph lines over which petitioner's messages travel" (page 129). The emergency legislation sustained in *Wilson* v. *New*, 243 U. S. 332 (1917), establishing an eight-hour day and minimum wages for railroad employees to prevent a general railroad strike, was also sustained as tending to prevent interruptions. The first Railroad Retirement Act, 295 U. S. 330 (May 1935) was held invalid by five to four on the ground that it had no reasonable relation to safety, economy or efficiency: the dissenting minority agreed with the test, and differed from the majority only because of their belief that the test was met.

[22] *Railroad Retirement Board* v. *Alton Railroad*, 295 U. S. 330 (1935); *Carter* v. *Coal Company*, 298 U. S. 238 (1936).

Second Reason:

Objections to the principle involved in the child labor Amendment

For varying reasons, in some cases overlapping, the same Senators who opposed the child labor Amendment would naturally have opposed any attempt to induce Congress to supersede State authority and subject child labor to a uniform Federal rule. These reasons have already been briefly summarized (*supra*, p. 8 note). They were not repeated and debated immediately preceding the vote by which the Senate substituted the provisions of the Wheeler-Johnson bill for the child labor provisions of the Black bill. It was not necessary that they should be; they were too well known; they had often been explained before. And the population of the States opposed to the Amendment was (in 1940) over 58,000,000.

Third Reason:

Fear that direct prohibition would definitely kill the child labor Amendment

Singularly enough, some Senators who favored the Amendment joined those who did not in opposing the direct prohibition of child labor. Some Senators at least believed that there was still a possibility that the Amendment might be ratified. Their position was that they did not wish to do anything which might interfere with that possibility. The following is quoted from the hearings before the Committee on Interstate Commerce on S 592, S 1976, S 2068, S 2226 and S 2345, 75th Congress, 1st Session (1937):

> "SENATOR BARKLEY: If we are going to pass a law, I want it to be the best law we can get, and I want to say, in this connection, that I am not convinced, as a matter of technic, that it is wise to pass any law just now. I am not so certain but what any law passed on the subject might lull the people into the belief that

we had done something effective, and thereby retard the effort to get the additional eight States required to ratify the amendment. I think the ratification of the child-labor amendment is infinitely more important than the passage of any law we can enact at this session of Congress.

"MR. KEATING: I agree with you 100 per cent.

"SENATOR BARKLEY: I say that in spite of the fact that I have introduced a bill on the subject. I would oppose my own bill if I felt that its enactment into law would lull the American people into a feeling of security, that we had done something that made unnecessary the ratification of the child-labor amendment.

"That is where I stand on the whole subject. I would rather wait 2 or 3 years to get the child-labor amendment ratified than to pass the best law we can pass here dealing with interstate commerce that might result in the ultimate defeat of the child-labor amendment. I want to make that statement because that is my settled conviction on the subject.

"THE CHAIRMAN: Assuming, for the sake of argument, that you can pass a law that would prohibit child-labor goods being shipped from one State to another, and it was held constitutional by the Supreme Court, that certainly would not eliminate the necessity of having the amendment.

"SENATOR BARKLEY: I agree with you" (page 15).

Fourth Reason:

The prohibition was unnecessary if *Hammer* v. *Dagenhart* should be overruled; and if it should not be the prohibition may well have been thought undesirable

There was practically unanimous agreement that the shipment of child-labor goods in commerce should be prohibited if this court would sustain the prohibition. In this respect Congress merely adhered consistently to the attitude which it had taken twenty years before and which had

never changed. The purpose would be accomplished if this court should change its mind; and in that event there was no reason for any further attempt by Congress to deal with the subject of child labor. The Democratic platform had not promised anything further, nor had the President recommended anything further.

On the other hand, if *Hammer* v. *Dagenhart* were still to be the law, what useful purpose could be served by a prohibition of child labor in commerce? There had been a history of abuses and many complaints about child labor in mines, factories and workshops; there had been no such history and so far as we know no such complaints that boys were being oppressed by permitting them to serve as telegraph messengers or as office boys in banks or in the headquarters offices of interstate carriers. So far as the telegraph messenger was concerned, the profession had been idealized and romanticized by HORATIO ALGER, JR. in "*The Adventures of a Telegraph Boy*"[23] to such a point that to many an American lad it was his second choice of a start in life—the next best thing to being a cowboy. In this classic the hero foils a burglar, displays resourcefulness and courage on many occasions, and after a year or two of service in the telegraph office makes a contact with a customer which leads to a position at three times his messenger salary.

The situation confronting Congress in this respect was not unlike that which this court considered in connection

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[23] David McKay, Philadelphia, 1889: "The life of a telegraph boy is full of variety and excitement. He never knows when he goes to the office in the morning on what errands he may be sent, or what duties he may be called upon to discharge. He may be sent to Brooklyn, or Jersey City, with a message—sometimes even farther away. He may be detained to supply the place of an absent office boy, or sent up to [illegible]n to go out and walk with a child. In the evening he may be directed to accompany a lady to the theater as escort. These are a few of the uses to which telegraph messenger boys are put" (p. 22). It was general knowledge that EDISON and CARNEGIE had started life as telegraph messengers. So had two Western Union presidents and a considerable proportion of the higher officials of both telegraph companies.

with the income tax law which was held unconstitutional in its entirety in *Pollock* v. *The Farmers Loan and Trust Company*, 158 U. S. 601, 636, 637 (on rehearing, 1895). The income tax if confined to wages and earnings would have been a perfectly valid excise; but in answer to the suggestion that it should be sustained so far as Congress had power to enact it this court concluded that if Congress had known that it could not tax rents and bond interest it would not have wished to tax wages.

That some Senators at least may have been opposed to the prohibition of child labor in commerce for this reason is not mere speculation. The report of hearings before the Committee on Interstate Commerce of the Senate in connection with the Wheeler-Johnson bill and the other child labor bills, held on May 12, 18 and 20, 1937, 75th Congress, 1st Session, contains the following (page 99). The Chairman (Senator WHEELER) was questioning Mr. DINWIDDIE, General Secretary of the National Child Labor Committee, regarding the employment of children under eighteen in "extra hazardous" employments:

> "THE CHAIRMAN: Suppose you said that you should prohibit all children under 18 from working for any mining company. They might be engaged in office work, or they might be engaged in surface work, or they might be engaged as messenger boys.
>
> "You do not think that a boy of 16 could not do some of that work. Do you not think it would be better for him to be engaged in doing some work of that kind rather than running around the streets?
>
> "If his parents do not or cannot send him to school, would it not be better for him to be engaged in some useful occupation rather than playing around the streets? After all, we want to look at it as a practical proposition. We do not want to do the children of the country a lot of harm when they are trying to do them good."

The case is not affected by the fact that the conference report did not state fully or accurately the reasons for omitting the prohibition of child labor

As we have already pointed out the Conference Report stated that it had adopted the child labor provisions of the House amendment (with one exception) rather than the Senate bill. The caution of the Senate had led it to insert three provisions hedging against the possibility that *Hammer* v. *Dagenhart* might still be followed; the House had thought these precautions unnecessary, and in that respect the Conference Committee had agreed with the House. But as to the "one exception", the omission of the prohibition of child labor, which the House bill had contained and the Senate had refused to agree to, the Conference Committee said in its report:

> "In view of the omission from the conference agreement of the principle of section 6 of the House amendment, subsection (b) of section 10 of the House amendment has been omitted."[24]

This statement does not, and probably was not intended to, give all the reasons for the omission of section 10b.

The House bill provision prohibiting child labor in commerce read:

> "Every employer engaged in commerce *in an industry affecting commerce* is prohibited from employing any employee under any oppressive child-labor condition."

The provisions relating to wages and hours used the same language: "No employer engaged in commerce *in an industry affecting commerce,*" and "Every employer engaged in commerce *in an industry affecting commerce.*" Section 6 directed the Secretary of Labor to determine the

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[24] HR Report No. 2738, 75th Congress, 3rd Session. June 11, 1938.

relation of the various industries to commerce and to issue orders declaring that particular industries were industries affecting commerce.

When the Conference Committee decided to do away with this function of the Secretary of Labor, it substituted, in the case of wages and hours, "who is engaged in commerce or in the production of goods for commerce" for the House language "engaged in commerce in an industry affecting commerce", and there was no reason why it should not have done the same thing with the child labor provision if it had been desired that that prohibition should be preserved.

But the fact that the Conference Report did not say in so many words that their report was a compromise, and that with respect to the direct prohibition they had yielded to the views of the Senate conferees, whereas in various other respects they had yielded to the views of the House conferees, cannot alter the obvious facts. They did not make such a statement about any other part of their report, and it is not necessary or common for a conference committee to state expressly that it is compromising. Its ordinary function is one of compromise. Everybody knew, we think, the varying reasons why a large majority of the Senate opposed the prohibition. It was not necessary and might perhaps not have been politic for the Conference Committee to restate and emphasize the differences. The leaders in both houses were anxious to pass the bill, and there was a minority which had already delayed it for a year (it was now June, 1938) and would have welcomed any opportunity to delay it still further. It seems probable that, perhaps for this reason, the House conferees consciously refrained from emphasizing the divergence of views as to the prohibition of child labor and the extent to which they had been forced to yield to the Senate. Commenting on the Conference Agreement the House managers said, with regard to the final form of the declaration of policy:

> " * * * it states * * * that the existence * * * of labor conditions detrimental to the maintenance of

> the minimum standard of living necessary for health, efficiency, and general well-being, causes the effects on commerce described * * *. It is declared to be the policy of the act to correct, and as rapidly as practicable to eliminate, these conditions in such industries *without substantially curtailing employment or earning power.* This is the policy which has guided the Congress in the prescription of the definite wage, hour, and *child labor provisions;* this is the policy which the Congress has set to guide the Administrator and the industry committees in working toward progressive improvement of labor standards." House Report No. 2738, 75th Congress, 3rd Session, page 28. (Emphasis supplied.)

It is evident that the finding and declaration in this, their final, form had nothing whatever to do with child labor, which could not be abolished without substantially curtailing employment or earning power; and the insertion of "child labor" in the foregoing quotation was purely gratuitous.

Commenting on the Conference Report when it was presented to the Senate, and in response to questions, Senator THOMAS of Utah said:

> "Neither House nor Senate yielded its convictions, but both obtained their common objective, which was to abolish traffic in interstate commerce in the products of child labor and in the products of underpaid and overworked labor."[25]

And again:

> "Q. Are there any provisions in the bill covering child labor? A. Yes; child labor is forbidden by preventing goods to be shipped in interstate commerce when produced by child labor."[26]

In other words, forbidden to that extent and to that extent only.

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[25] Cong. Rec. Vol. 83, Part 8, page 9163.

[26] Cong. Rec. Vol. 83, Part 8, page 9164.

The Senate leaders, having won their point about child labor, were doubtless no more anxious than the leaders in the House, for the reason suggested above, to prolong the discussion and thus endanger the prompt passage of the bill.

"Oppressive" Child Labor

The child labor which was to render goods unshippable for thirty days was, both houses agreed, the labor of employees under sixteen and of employees under eighteen in occupations duly determined to be hazardous. It takes several lines to say this, and some short definition was necessary in order to avoid cumbersome repetition. In the House bill and the original Senate bill "oppressive child labor" was the term used to cover this concept. In the bill that passed the Senate child labor was specially defined without the disagreeable epithet (section 24 E). But since the epithet did not enlarge the prohibitions there was no reason why the Senate conferees who opposed the prohibition of child labor should have objected to it; no doubt they were quite willing to accept the epithet in exchange for no prohibition, and so the epithet survived. In any event a national policy cannot be established by a disagreeable word in a definition.

Summary

The court below said:

> "The act was a compromise of two quite separate designs: that of the House, which was to regulate child labor by national standards; that of the Senate, which was to prevent one State from breaking down the standards of another by unregulated competition. The House won * * *."[27]

[27] 141 F. (2d) 400, 403 (1944).

It is evident from the foregoing history that the lower court's conclusion as to what happened was directly contrary to the facts. In the act as passed there is no pretense, either by way of a declaration of policy or a prohibition, that child labor is to be regulated by national standards: that was indeed the design of the House, and it was a design to which the Senate would not agree and as to which the Senate prevailed. All that was left of the child labor provisions when the act was finally passed was a prohibition of the shipment in commerce of goods produced in a child-labor establishment for thirty days after the child labor ceases; and with the exception of the thirty-day provision this is a prohibition the meaning and scope and legal effect of which have been thus described by this court in connection with goods produced in violation of the wage and hour provisions of the same act:

> "The motive and purpose of the present regulation are plainly to make effective the congressional conception of public policy that interstate commerce should not be made the instrument of competition in the distribution of goods produced under sub-standard labor conditions, which competition is injurious to the commerce and to the States from and to which the commerce flows * * *. As we have said the evils aimed at by the act are the spread of sub-standard labor conditions through the use of the facilities of interstate commerce for competition by the goods so produced with those produced under the prescribed or better labor conditions * * *. Congress, to obtain its objective in the suppression of nation-wide competition in interstate commerce by goods produced under sub-standard labor conditions, has made no distinction as to the volume or amount of shipments."
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> *U. S.* v. *Darby*, 312 U. S. 100, 115, 122, 123 (1941).

Of the six differences between the Senate and the House with respect to child labor, only two were of any importance in determining whether the design of the Senate or that of the House (and the lower court has accurately stated the

difference between them) was adopted by Congress. The differences were these:

(1) The House bill prohibited child labor in commerce and the Senate bill did not.

(2) The House bill contained a finding and declaration of policy which was probably intended to apply to child labor and the Senate bill did not.

(3) The Senate bill hedged against the possibility that *Hammer* v. *Dagenhart* might not be overruled by providing that child labor goods should be branded or labeled. The House thought this unnecessary.

(4) The Senate bill also hedged against this possibility by subjecting child labor goods to the law of the State of destination in the original package. The House thought this unnecessary.

(5) The Senate bill hedged against the possibility that it might be unconstitutional to prohibit the shipment in commerce of goods not produced by child labor although produced in an establishment where other child labor was employed, and created a rebuttable presumption instead of absolutely prohibiting the shipment of any goods from such an establishment. The House thought this unnecessary.

(6) The Senate bill defined child labor without a disagreeable epithet; the House bill defined it with the adjective "oppressive".

Only the first two differences were of any importance in determining which design prevailed. On those two the Senate won. As to the remaining four, which were immaterial in determining the Congressional design, the House won, which furnished an excuse to the Conference Committee to say that they had (in general) accepted the House bill. With one exception, they said; but the final declaration of policy certainly did not apply to child labor, so there were really two exceptions, and in determining which design prevailed they were the only ones that count.

II

Since Congress did not intend a uniform national prohibition of child labor in commerce, but expressly refused to enact one or to declare any general national policy on the subject, the prohibition actually adopted must be construed in accordance with the natural and ordinary meaning of the language used, and so construed clearly does not apply to the operations of a telegraph company.

The only child labor provision which survived was as follows:

> "Section 12 (a). After the expiration of 120 days from the date of enactment of this act, no producer, manufacturer, or dealer shall ship or deliver for shipment in commerce any goods produced in an establishment situated in the United States in or about which within thirty days prior to the removal of such goods therefrom any oppressive child labor has been employed * * * ".

Reading this language in its natural sense, no group of persons operating a telegraph enterprise could possibly have supposed that it was intended to affect their business. No telegraph company counsel could have advised his executives that it was so intended; no telegraph executive could have believed his counsel if he had been so advised.

Congress "is presumed to have used a word in its usual and well-settled sense", *U. S.* v. *Stewart*, 311 U. S. 60, 63 (1940). There is "no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes", *U. S.* v. *American Trucking Associations*, 310 U. S. 534, 543 (1940). "The legislature must be presumed to use words in their known and ordinary signification, unless that sense be repelled by the context", *Levy's Lessee* v. *McCartee*, 6 Pet. 102, 110 (1832). Words are used as understood in "common speech", *Sonn* v. *Magone*, 159 U. S. 417, 421 (1895); in "the usual, ordinary and everyday meaning" of the terms, *Old*

Colony Railroad Co. v. *Commissioner*, 284 U. S. 552, 561 (1931); and "are to be interpreted in accordance with the understanding of the common man from whose vocabulary they were taken", *U. S.* v. *Thind*, 261 U. S. 204, 209 (1922).

The reason for this rule of statutory construction is that public statutes are addressed to the community at large, and being designed to constitute a rule of conduct for such community, must have been written so as to be understood by those to be guided thereby, *Maillard* v. *Lawrence*, 16 How. 251, 261 (1853).

The courts must ascertain the intent of the law-maker "to be found in the language that he has used", *U. S.* v. *Goldenberg*, 168 U. S. 95, 102 (1897) and must prefer the plain, obvious, and rational meaning of a statute "to any curious, narrow, hidden sense that nothing but the exigency of a hard case and the ingenuity and study of an acute and powerful intellect would discover", *Lynch* v. *Alworth-Stevens Company*, 267 U. S. 364, 370 (1924).

The broad scheme of the Black-Connery bills as first introduced was to enumerate and define certain conditions of employment which were deemed to be objectionable and (1) to prohibit employment in commerce, or in the production of goods for commerce, under any of those conditions and (2) to ban from commerce goods so produced. It was the universal understanding in Congress that the prohibition as to employment *in commerce*, except as to the specific exemptions, covered the great railroad systems and other interstate public utilities engaged, not in producing goods, but in rendering services, while the prohibitions with respect to employment in production of goods and shipment of goods applied, not to services, but to things designed for sale to a consumer.

In *McLeod* v. *Threlkeld*, 319 U. S. 491 (1943), the question was whether cooks employed by a contractor, who furnished meals to maintenance-of-way employees of an interstate railroad, were within the minimum wage provisions of the act, which apply to (1) employees engaged in commerce and (2) employees engaged in the production of

goods for commerce. The court, in approaching the question, first cleared the atmosphere by pointing out that the only thing to be determined was whether the employees were in the first class, namely, actually engaged in commerce:

> "McLeod was not engaged in the production of goods for commerce. His duties as cook and caretaker for maintenance-of-way men on a railroad lay completely outside that clause. Our question is whether he was 'engaged in commerce'."

A footnote points out that cooks employed to feed workers engaged in the production of goods for commerce have been held to be similarly engaged.

Railroads make and repair equipment which actually moves physically in commerce. Nothing of that sort occurs in any telegraph operating room. It would have been far less of a strain of the meaning of language to hold that railroads were producing goods for commerce than to hold that telegraph companies are.

But it would not help the plaintiff if it could be held that telegraph companies are producing goods for commerce. For there is no prohibition of the employment of child labor either in commerce or in production of goods for commerce; the only prohibition is against the shipment in commerce of goods produced in a child-labor establishment within the previous thirty days.

The Artificial Definitions

Probably the suit would not have been brought, and certainly the lower courts would not have agreed with the plaintiff, if it had not been for the artificial definitions of "goods" and "produced". Those artificial definitions are as follows:

> "'Goods' means goods (including ships and marine equipment), wares, products, commodities,

> merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof, but does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof".
>
> "'Produced' means * * * in any * * * manner worked on * * * ; and * * * an employee shall be deemed to have been engaged in the production of goods if such employee was employed in * * * handling, transporting or in any other manner working on such goods * * * ".

But there is no artificial definition of "ship" or "shipment"; and since shipping and delivery for shipment are the only things with respect to child labor which are prohibited, and since these words in their natural sense cannot possibly apply to the transmission of intelligence by wire, the plaintiff's case fails at its vital point.

Telegrams Are Not "Goods"

The argument is that telegrams come under the artificial definition because they are "subjects of commerce", and of course they are. But what "goods" Congress meant must be determined not only from the definition but from the nature of the prohibition and the object which was to be accomplished. The goods with which Congress was concerned were goods (1) with parts or ingredients; (2) which are to be delivered into the actual physical possession of a consumer; and (3) which in their nature are susceptible of being shipped. A subject of commerce which fulfills none of these requirements may be goods, but cannot be the sort of goods which Congress had in mind.

We insist on no distinction between tangible and intangible subjects of commerce. It may well be that the insertion of "subjects of commerce of any character" was intended to make it clear that the prohibition applied to intangibles as well as tangibles. We do not dispute that

the production and sale of gas or power might come within the act.[28] **But it is plain that what Congress had in mind was some *res*, tangible or intangible, which is produced, transported and sold to be consumed, in competition or potential competition with other sales of similar products.** Only in that way can the clear intention of Congress to prohibit only competitive advantages in interstate trade be realized.

"A statute must be read in the light of the mischief to be corrected and the thing to be attained." *National Labor Relations Board* v. *Hearst Publications*,[29] 64 S. Ct. 851 (April 24, 1944). Citing many cases.

A Telegraph Company Is Not a Producer

It is not contended that Western Union is a manufacturer or dealer. It comes within the act (it is claimed) if it is a producer or not at all. No one would say that it is a producer except for the artificial definition, according to which

> "'produced' means * * * in any * * * manner worked on"

and an employee is deemed engaged in production of goods if he is employed in

> "handling, transporting or in any manner working on such goods."

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[28] A gas or electric company which performs a utility service in transporting of transmitting its product, but also manufactures and sells the product itself, has a dual character, as the court has recently pointed out in connection with rates, and it is possible that the prohibition might apply to the production and sale of the commodity or res but not to the utility service, so that for employing child labor in production the company might be enjoined from delivering its own product but not from transporting or transmitting the product of another company. We need not perhaps further speculate as to this; we mention it only because the question was briefly raised by a member of the court during the argument below.

[29] Holding newsboys to be employees of the newspapers.

But again a statute must be read in the light of the mischief to be corrected and the thing to be attained. These definitions were not inserted in the act exclusively or even primarily with reference to child labor. Employment in violation of the wage and hour provisions of the act was prohibited not only in commerce but in the production of goods for commerce. Had it not been for the artificial definition, if A manufactured material and gave it to B to process or package, B might well have said that the goods were not produced by him. The function of the definition is obviously to preclude that claim.

That it cannot apply literally in every case arising under the act is evident. If it did, let us see what the consequences would be. Every carload of freight transported by a railroad company is "produced" by the railroad company, since it is handled or worked on by the railroad company. Section 15 (a) makes it unlawful

> "to transport * * * or to ship * * * any goods in the production of which any employee was employed in violation of section 6 or section 7" (the wage and hour provisions of the act) "* * * except that no provision of this act shall impose any liability upon any common carrier for the transportation in commerce in the regular course of its business of any goods *not produced by such common carrier* * * *".

But if everyone who handles goods is *always* a producer, every carload of freight handled by a railroad company is produced by the railroad company, and there could therefore be no such thing as freight which the railroad company handling it did not produce. So if a railroad employee handling freight were paid less than the minimum wage prescribed by section 6 the railroad company could never transport that freight, and if a railroad employed child labor in its establishment no "goods" "produced" anywhere in its establishment (which would include all freight handled by it) could be shipped across any State line anywhere for thirty days.

The mere statement is enough to show that the artificial definition of "produced" was intended to apply only to the prohibitions with regard to employment in production and the subsequent shipment of goods produced in violation of those prohibitions, but never to the service operations of a public utility company handling what in the ordinary meaning of the term is the product of its customers or patrons.

A telegraph company does not "ship" its telegrams

The transmission of telegrams is not within the sweep of a statute dealing with the transportation or shipment of goods unless telegraph companies are expressly mentioned by name

There is no artificial definition of "ship". The word is used in its natural sense.

For ninety years the Congress and the State legislatures have been legislating about telegraph companies, and we know of no single instance in which their business has been held to be included in the term "transportation", or where they have been held included in the term "carriers", except where the specific statute has contained a definition bringing them within the particular act. For instance the original Interstate Commerce Act was passed in 1887. Nobody supposed that it applied to telegraph companies, and it did not. This court held in *Primrose* v. *Western Union*, 154 U. S. 1 (1894), that telegraph companies were not common carriers. This court, like other courts, held that in many respects their functions were analogous to those of common carriers, in that they could not lawfully discriminate in their charges or practices and were bound to charge reasonable rates. On the other hand they were unlike common carriers in that they were permitted to limit their liability for negligence. In 1910 they were brought under the Interstate Commerce Act by an

amendment (36 Stat. 539) providing that they should be deemed to be common carriers "for the purposes of this act"; and when they were separated from the railroads for the purpose of regulation by the Communications Act, the Communications Act (48 Stat. 1064) defined them as carriers or common carriers, "for the purposes of" that Act. But they are not carriers, either common carriers or contract carriers, for any other purpose. Telegrams are transmitted, never shipped. Even the physical piece of paper containing the message, which may move in commerce from the last telegraph office to the addressee, cannot possibly be said to be "shipped" in commerce. A person not a carrier transporting his own property across a State line or otherwise does indeed transport it but certainly does not ship it.[30] If Congress had actually intended to include telegraph messengers in the act, a court should require more appropriate language than this before applying criminal sanctions, or the civil sanction of complete interruption of the industry. We repeat that before the lower courts spoke no counsel could reasonably have advised a telegraph executive that this language applied to him, nor could a reasonable executive have believed his counsel if he had been so advised.

Under all the thousands of laws and regulatory orders dealing with the transportation of goods there is no other instance in which any court or administrative tribunal has held that telegraph companies fall within prohibitions addressed to carriers of goods except where they are specifically stated to be included.

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[30] The Oxford Dictionary gives, as one of the meanings of "ship", the following:

> "To transport (goods) by rail or other means of conveyance. U. S."

But the only two illustrations given are "to ship their freight by rail" and "we * * * shipped our * * * collection of luggage to the hotel". It is proper to say that a vessel ships a cargo and perhaps that a railroad ships a carload of freight; but the term cannot properly be so used of any one except a carrier.

In *Consumers Import Co.* v. *Kabushiki, et al.*, 320 U. S. 249, 252 (November 8, 1943), in construing the Marine Fire Statute, this court said:

> "The provision here in controversy is section 1 of the act of March 3, 1851. Despite its all but a century of existence, the contention here made has never been before this court."

The same may be said, during all but a century, of the contention that a statute referring to transportation of goods includes the transmission of messages, or that a statute relating to the production of goods has any application to the telegraph business.

Although the right to recover for payment of less than minimum wages is remedial, *Overnight Motor Company* v. *Missel*, 316 U. S. 572, 583 (1942), the statute as a whole and the whole of the child labor provision are penal, and in derogation of the common law. *United States* v. *Darby*, *supra*. In such cases especially courts cannot "safely disregard the popular signification of the terms employed, in order to bring acts, otherwise lawful, within the effect of such statutes, because of a *supposed* public policy or purpose", *Sarls* v. *United States*, 152 U. S. 570, 575 (1894). An ambiguous criminal statute must not be extended, by construction, to embrace cases not *clearly* within it, *Krichman* v. *U. S.*, 256 U. S. 363, 368 (1921).

In *McBoyle* v. *U. S.*, 283 U. S. 25, 26-27 (1931) it was held that the National Motor Vehicle Theft Act, although defining motor vehicles to include "an automobile, an automobile truck, an automobile wagon, motorcycle, or any other *self-propelled vehicle*, not designed for running on rails", did not apply to aircraft:

> "No doubt etymologically it is possible to use the word to signify a conveyance working on land, water or air * * *. But in everyday speech 'vehicle' calls up the picture of a thing moving on land. * * * For after including automobile truck, automobile wagon and motorcycle, the words 'any other self-propelled

vehicle not designed for running on rails' still indicate that a vehicle in the popular sense, that is a vehicle running on land, is the theme. It is a vehicle that runs, not something, not commonly called a vehicle that flies. * * *

"Although it is not likely that a criminal will carefully consider the text of the law before he murders or steals, it is reasonable that a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear. When a rule of conduct is laid down in words that evoke in the common mind only the picture of vehicles moving on land, the statute should not be extended to aircraft, simply because it may seem to us that a similar policy applies, or upon the speculation that, if the legislature had thought of it, very likely broader words would have been used."

Similarly, district courts have consistently held that "vessel", as used in admiralty statutes, even when defined to include "every description of watercraft or other artificial contrivance used, or capable of being used as a means of transportation on water," does not include a flying boat or seaplane. *Dollins* v. *Pan-American Grace Airways*, 27 F. Sup. 487 (1939); *Noakes* v. *Imperial Airways*, 29 F. Sup. 412 (1939); *U. S.* v. *Peoples*, 50 F. Sup. 462 (1943).

Neither district court nor circuit court of appeals gave any reason for concluding that telegrams are "shipped"

The district court (Judge RIFKIND) found this question "troublesome". But it is evident from his opinion that he had permitted the plaintiff to persuade him that the design of the act finally passed was the same as that of the framers of the House bill, namely, to effectuate some broad national policy with respect to child labor which Congress (unlike the House) was too bashful expressly to declare. Congress, he thought, wished "to keep the streams of interstate

commerce undefiled by the products of child labor" (R. 22). Even this we cannot concede. Goods produced in an establishment employing child labor but not themselves produced by child labor could not defile commerce, and it is clear that Congress did not think that commerce itself was defiled by children working in commerce, or the prohibition against children working in commerce would no doubt have been retained. Moreover, child-labor-establishment goods are not forever barred from commerce like stolen automobiles or lottery tickets, or even like goods produced in violation of the wage and hour provisions of the act; they can be shipped in commerce as freely as other goods thirty days after the child labor ceases. The purpose of Congress, as distinguished from the House, was a very different one: it was to prevent the employer of child labor from having a competitive advantage in interstate trade as against the employer of labor in another State who refrains from employing children, either voluntarily or because of stricter State laws. But in dealing with the "troublesome" question of the meaning of "ship" the district judge admits that "ship" is not the proper word. He erroneously states that this court has held that telegraph companies are engaged in "transportation" (R. 22).[31] Ship, he says, is the correct word with respect to movements by rail, by air or truck (R. 22); and so, without more, he leaps to the conclusion:

> "I do not think that Congress intended to *limit* the application of the act to the conventional modes of shipment" (R. 22).

In other words it was plainly his idea that the act had a broader purpose than was indicated by anything in its language and that we are trying to limit it, whereas our position is simply that there was no such broad purpose ex-

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[31] The court of appeals says that: "there is not the least similarity between what the defendant does and the transportation of goods by a common carrier". (R. 36).

cept in the mind of the House, and that to that Congress refused to agree.

The circuit court of appeals fell into the same error. "No reason", they say, "is suggested for such a capricious *limitation upon a purpose which was apparently pervasive*" 141 F (2d) 403. The act, they say, "was a compromise of two quite separate designs; that of the House, which was to regulate child labor by national standards; that of the Senate, which was to prevent one State from breaking down the standards of another by unregulated competition. The House won, and it would leave its plan in large part unrealized to omit child labor in interstate commerce * * *" (*ibid*).

It is perfectly true that it would leave *its* plan—the House's plan—in large part unrealized to omit child labor in interstate commerce; but the House's plan was repudiated by Congress, and on this particular point, as we have abundantly shown, the House did not win but the Senate did. And the court has correctly stated the design of the Senate, which Congress determined should prevail. The inconsistency of the court's attitude is shown by the fact that it concedes that child labor in commerce is not prohibited; indeed the plaintiff concedes it and always has; and the plaintiff did not seek and the court did not grant an injunction against the continued employment of child labor by the defendant.

Finally we quote the reason given by the court of appeals for holding that the word "ship" applied to telegrams. They realized that this point was essential to the judgment. It must be assumed that the reason they gave—the only reason they gave—was the best one they could think of. This was it:

> "Last, we have to say whether, assuming that a message received for transmission is 'goods' and that the defendant 'produces' it, it also 'ships' the message, when it sends the pulsations over the telegraph wires. Although that is indeed an inappropriate word to apply to 'intangibles', its unfitness for

> the most part disappears, once we treat messages as 'goods'. Certainly we should stultify ourselves, having gone so far, if we were to refuse to understand it as covering what is here involved."

This reason does not seem to us to be a good one. They first hold that messages are goods, in the face of the objection that Congress had in mind only the sort of goods that are shipped, and that messages are not shipped. And they follow with the conclusion that although the word "ship" is inappropriate, its unfitness "for the most part" disappears when they have determined that messages are goods. The question is whether the man in the street—or in the operating room—should have understood from this language that Congress meant telegrams. We can think of no better example of attributing to words used in an act of Congress a "curious, narrow, hidden sense that nothing but the exigency of a hard case and the ingenuity and study of an acute and powerful intellect would discover" such as was condemned in *Lynch* v. *Alworth-Stevens Co., supra.*

The district court's reference to the exemption of child actors and the failure to exempt telegraph messengers

Child actors were expressly exempted from the child labor provisions. Had they not been, it might have been argued that traveling theatrical companies, which "produce" various "goods" in the regular course of their business, could not travel across State lines. The argument might not have been sound. But the stage carpenter produces various props, and costumes are made and altered; photographs of the cast are taken, and there are various other activities of this sort which might come within the definition of production of goods.

As to telegraph messengers, no one suggested their exemption because no one had any idea that they were in any way affected, once the prohibition of child labor in commerce was left out. The district court's idea, as already

pointed out, was that there was a general policy of prohibition of child labor, and that the defendant was seeking to have this limited; whereas our position was, quite simply, that Congress did not intend to prohibit anything except what it prohibited.

III

It is clear from the Act as a whole that Congress did not regard communications (although subjects of commerce) as goods, their handling as production or their forwarding as shipment.

(1) If telegrams were goods the telegraph company would be required to refuse to accept, from any customer, a message produced by child labor or by labor employed in violation of the wage and hour provisions of the act.

"Goods" produced by child labor or by employees employed in violation of the wage and hour provisions of sections 6 and 7 may be given to a common carrier for shipment, and the producer violates the act by so doing; but the common carrier must take the goods and deliver them: no provision of the act "shall impose any liability upon any common carrier for the transportation in commerce in the regular course of its business of any goods not produced by such common carrier, and no provision of this act shall excuse any common carrier from its obligation to accept any goods for transportation" (section 15 (a) (1)).

A telegraph company is not a common carrier, and it does not transport goods in the ordinary course of its business. If messages are "goods", and if every message that is sent is "shipped", what happens if the sender of a telegram has dictated it to a secretary who is under sixteen, or who is employed in violation of the wage or hour provision?

Obviously the exemption applicable to carriers does not protect the telegraph company. Still more obviously it was not the intention of Congress to require the telegraph

company to refuse to permit the "shipment" of the message—the "goods"—for any such reason. If the telegraph company must accept and transmit the message, even though it has full knowledge of the circumstances, it can be for no other reason than that Congress did not regard messages as goods and did not regard their transmission as a shipment.

(2) If plaintiff's construction were correct, the employer of child labor could never send any interstate telegrams at all, or even use the mail.

If the message is goods, and the sending of it by a telegraph company is a shipment, giving it to the telegraph company to send is a shipment or certainly a delivery for shipment, and if there is child labor anywhere in the sender's establishment, whether connected with the production of the message or not, such shipment is forbidden for thirty days after the child labor ceases. It is difficult indeed to see how, on this theory, the child-labor establishment could even be permitted to use the mails. If a telegram is goods a letter must be; if a telegram is shipped a letter must be shipped when it is put in the post.

(3) Neither (if plaintiff were correct) could the telegraph company send telegrams about its own business, ship its poles or office supplies, or use the mail.

The point is self-explanatory. If the telegraph company may not lawfully send another person's message it certainly may not lawfully send its own. If there is child labor in its establishment no goods of any kind produced (handled) in that establishment may be shipped in commerce for thirty days.

(4) The provision for employment of telegraph messengers at less than minimum rates indicates the expectation of Congress that telegraph companies would continue to employ young boys.

There can be no doubt that Congress had in mind and gave some consideration to the problems presented in connection with the employment of telegraph messengers.

Section 14 provides:

> "Learners, apprentices and handicapped workers:
> "The administrator, to the extent necessary in order to prevent curtailment of opportunities for employment, shall by regulations or by orders provide for (1) the employment of learners, of apprentices, *and of messengers employed exclusively in delivering letters and messages*, under special certificates issued pursuant to regulations of the administrator, at such wages lower than the minimum wage applicable under section 6 and subject to such limitations as to time, number, proportion, and length of service as the administrator shall prescribe * * *".

The italicized words were inserted by the Conference Committee, and had not appeared in any of the previous drafts of the bill. They were of course inserted at the request of the telegraph companies. Congress, since it had in mind this occupation, undoubtedly also had in mind, what everyone knows, that a substantial proportion of the total number of telegraph messengers had always been boys under the age of sixteen. Fifteen is probably the optimum age for a messenger from the point of view of management: "messenger" and "messenger *boy*" were practically controvertible terms; and these younger boys, not having the responsibilities of heads of families, and being capable of performing messenger duties as well as older boys and often better because of their alertness and the fact that they did not expect immediate promotion, had always been available in the labor market at rates of pay generally less than the minimum of twenty-five cents an hour provided for in the original act. The telegraph companies had not fully

recovered from the prolonged depression, and the fear that they would necessarily have to curtail employment if obliged to pay the statutory minimum at once was thought by Congress to have a possible foundation.

The point is that the special treatment of telegraph messengers was due primarily to their youth. It was not because they were learners or apprentices, for learners and apprentices were otherwise expressly provided for. After a few months of experience a messenger is probably as efficient a messenger as he will ever become; the reason why the way was left open to employ him at less than the minimum was because he often was, and Congress expected that he often would be, young.

(5) It is unthinkable that Congress could have intended to authorize a court, by injunction, to close down completely the operations of a nation-wide public utility.

Child labor in commerce is not prohibited. The plaintiff concedes that she is not entitled to an injunction restraining the defendant from continuing to employ messengers under sixteen. No such injunction was asked for or granted. The only civil relief authorized by the act for a violation of the child labor provisions is an injunction restraining further violations, that is, an injunction restraining the shipment of goods produced in the establishment where child labor has been employed until thirty days after the child labor has ceased. In this case the injunction asked for and issued—and the only injunction that could have been issued—was an injunction against transmitting interstate messages (R folio 121-22). Even if the law means what the plaintiff says it means, we urge in the concluding point that to pass such a decree was error. But here we merely urge that the fact that this is the civil remedy, and the only civil remedy, provided by Congress for the violation of the child labor provisions shows plainly that it never entered the mind of Congress that the child labor provisions applied to the operations of a telegraph company, or indeed

to the purely service operations of any other public utility. The plaintiff's construction of the act would authorize an injunction closing down the Pennsylvania Railroad as well as the Western Union if the railroad employed child labor to help load a car of freight. An act of Congress is not to be construed as authorizing such consequences even if words appropriate to express such an intention were used.

IV

The construction of the act contended for by plaintiff would raise serious doubts as to its constitutionality, and should therefore be rejected even if the intent of Congress were doubtful.

We have referred to the doubts entertained by lawyers in the Senate in 1937 as to whether a direct prohibition of child labor in commerce would have been constitutional. The circuit court of appeals, informed with the wisdom of 1944, thought that such a prohibition would clearly have been constitutional, and probably no time should be spent in arguing this question. But we think that even today the result might possibly be affected by the presence or absence of a finding and declaration of policy by Congress that child labor has some tendency to obstruct or interrupt or impair the efficiency of commerce—a finding and declaration which Congress struck out of the present law.

Hammer v. *Dagenhart* was overruled in *United States* v. *Darby*, 312 U. S. 100 (1941), and at the same time the wage and hour provisions, as applied to employment in the production of goods for commerce, were sustained as valid regulations of commerce. But the Attorney General in his argument (312 U. S. at page 104) laid great stress on the Labor Board cases, and on the fact that Congress has found that the *wage and hour provisions* of the act "will diminish the obstructions to interstate commerce which flow from labor disputes"; and the opinion of the court also

stresses (page 109) the court's judicial knowledge of the purpose of the act because of the declaration of policy, which is quoted in full.

In the absence of any finding or declaration of policy it might still be reasonably argued that a court cannot take judicial notice of any facts tending to show that commerce is threatened with obstructions or interruptions by the continued employment of boys under sixteen in capacities in which they have long been regarded as adequate; and there is no question of their employment by a telegraph company resulting in unfair competitive advantage to anyone in interstate trade. The constitutional question therefore still exists.

The construction of the act contended for by the plaintiff produces, and the plaintiff insists that it should produce, the same results in practice which would have flowed from the direct prohibition which Congress was asked, but refused, to enact, except that the direct prohibition, if enacted and if constitutional, could have been enforced by a normal civil remedy, while the only civil remedy to which plaintiff is entitled under her construction of the act is an abnormal and impossible one. The abnormality of the remedy does not help to remove the constitutional doubt. A construction which leaves constitutionality uncertain must on well-settled principles be rejected even where there is room for argument as to the actual intent of the lawmaker, which is not the case here.

V

The decree enjoining Western Union from sending interstate messages was in any event erroneous.

If the law were with the plaintiff the lower courts should still have refused an injunction. The normal course in that event, we suggest, would have been to deny the injunction but retain jurisdiction of the cause, with the intimation

that it would be assumed that the defendant would obey the law, once the law was settled.

Undoubtedly this is what the defendant would do. But so far as the present civil suit is concerned, retaining jurisdiction of it would be an idle gesture; for an injunction forbidding defendant to transmit interstate messages would be no more permissible six months hence than now. If the law were determined to be with the plaintiff there are other methods of enforcing compliance, resort to which, however, would never be necessary. The decree for this reason alone should be reversed.

Conclusion

The decree should be reversed and the complaint dismissed.

Respectfully submitted,

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APPENDIX

APPLICABLE PROVISIONS OF THE FAIR LABOR STANDARDS ACT OF 1938 (52 Stat. 1060)

Section 2 (29 U. S. C. A., Sec. 202):

"(a) The congress hereby finds that the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several States; (2) burdens commerce and the free flow of goods in commerce; (3) constitutes an unfair method of competition in commerce; (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and (5) interferes with the orderly and fair marketing of goods in commerce.

"(b) It is hereby declared to be the policy of sections 201-219 of this title, through the exercise by Congress of its power to regulate commerce among the several States, to correct and as rapidly as practicable to eliminate the conditions above referred to in such industries without substantially curtailing employment or earning power."

Section 15a-4 (29 U. S. C. A. Section 215a-4) prohibits the violation of "any of the provisions of Section 12" (29 U. S. C. A. Section 212), the operative words of which are:

" * * * No producer, manufacturer or dealer shall ship or deliver for shipment in commerce any goods produced in an establishment situated in the United States in or about which, within thirty days prior to the removal of such goods therefrom, any oppressive child labor has been employed; * * * " (Section 12a; 29 U. S. C. A. Section 212a)

"Section 3 (i). 'Goods' means goods (including ships and marine equipment), wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof, but does not include goods after their delivery into the actual physical

possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof.

"Section 3 (j). 'Produced' means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof, in any State.

"Section 3 (l). 'Oppressive child labor' means a condition of employment under which (1) any employee under the age of sixteen years is employed by an employer (other than a parent or a person standing in place of a parent employing his own child or a child in his custody under the age of sixteen years in an occupation other than manufacturing or mining) in any occupation, or (2) any employee between the ages of sixteen and eighteen years is employed by an employer in any occupation which the Chief of the Children's Bureau in the Department of Labor shall find and by order declare to be particularly hazardous for the employment of children between such ages or detrimental to their health or well-being; " * * *. (29 U. S. C. A. Section 203)

"Section 14. The Administrator, to the extent necessary in order to prevent curtailment of opportunities for employment, shall by regulations or by orders provide for (1) the employment of learners, of apprentices, and of messengers employed exclusively in delivering letters and messages, under special certificates issued pursuant to regulations of the Administrator, at such wages lower than the minimum wage applicable under section 206 of this title and subject to such limitations as to time, number, proportion, and length of service as the Administrator shall prescribe," * * * (29 U. S. C. A. § 214)

"Section 15. No provision of this act shall impose any liability upon any common carrier for the transportation in commerce in the regular course of its business of any goods not produced by such common carrier, and no provisions of this act shall excuse any common carrier from its obligation to accept any goods for transportation." * * * (29 U. S. C. A. Section 215)

"Section 17. The district courts of the United States and the United States courts of the Territories and possessions shall have jurisdiction, for cause shown, and subject to the provisions of section 20 (relating to notice to opposite party) of the Act entitled 'An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes', approved October 15, 1914, as amended (U. S. C., 1934 edition, Title 28, Sec. 381), to restrain violations of section 215 of this title." (29 U. S. C. A. § 217).

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

No. 49

THE WESTERN UNION TELEGRAPH COMPANY,
Petitioner,

vs.

KATHARINE F. LENROOT, Chief of the Children's Bureau, United States Department of Labor,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF OF PETITIONER

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Plaintiff's Concessions

Plaintiff concedes that if she is right Congress must have intended to deny the use of the mails, as well as the privilege of sending interstate or foreign telegrams, to anyone using child labor or violating the wage or hour provisions. Manifestly, we think, this is not so. If Congress desired to enforce a policy by deprivation of the use of the mails it would have said so, and not expected a court to infer it from the prohibition of shipment of goods. We assume that a direct provision to this effect would have been plainly unconstitutional. Congress has power to establish

post offices and post roads, but not for the use of everyone except persons with red hair. It could not prescribe a rule of conduct to govern intrastate commerce and enforce its policy by denying the use of the mails to those who did not comply. It "may not exercise its control over the mails to enforce a requirement which lies outside its constitutional province", *Electric Bond Company* vs. *Commission*, 303 U. S. 419, 442 (1938). And while it may prohibit this or that specified kind of traffic in interstate communication by telegraph, depending on the nature of the traffic itself, it could not, we think, deny all interstate telegraph facilities to all persons who do not order their intrastate lives in accordance with congressional specifications. So Congress did *not* intend to deny child-labor employers the use of the mails, and therefore did not regard communications as goods.

The plaintiff also concedes, as we read her brief, that if a railroad company employed child labor to load a carload of freight, delivery of the freight must be arrested for thirty days, and that if it were loaded by employees paid less than the minimum wage it could never be delivered at all. These admissions are frank, and highly creditable in that they logically follow from the rest of plaintiff's argument and do not seek to confuse or evade the issue. When we point out that the plaintiff's case must stand or fall with them, we feel that there is little that we need add.

Even if the words used by Congress, read in the light of the legislative history, seemed to require such absurd conclusions, we might still fall back on the classical language of *United States* v. *Kirby*, 74 U. S. 482 (1868) at pages 486-7:

> "All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, *or an absurd consequence*. It will always, therefore, be presumed that the legislature intended exceptions to its language, which would avoid results of this character. * * * The common sense of man approves the judgment mentioned by Puffendorf, that the Bolog-

nian law which enacted, 'that whoever drew blood in the streets should be punished with the utmost severity,' did not extend to the surgeon who opened the vein of a person who fell down in the street in a fit".

Plaintiff's Comments on the Exemption of Common Carriers (Sec. 15 (a))

This exemption, discussed in our main brief (page 34), is as follows:

> " * * * no provision of this act shall impose any liability upon any common carrier for the transportation in commerce in the regular course of its business of any goods *not produced by such common carrier* * * *."

It will be noted that the privilege of the carrier is with respect to transportation, while the prohibition with respect to child labor does not mention transportation but only shipment or delivery for shipment. The prohibition with respect to goods produced in violation of the wage and hour provisions includes prohibition of transportation as well as of shipment and delivery in commerce.

Our position in the court below was that telegraph companies do not ship anything and that they do not transport anything. But if it could be supposed that Congress intended to include them in an act prohibiting shipment or transportation, then they must be included in the exemption applicable to carriers transporting in the regular course of their business. The exemption applies only where the goods transported are "not produced by such common carrier"; but if the plaintiff's view is accepted that by virtue of the artificial definition of production every carrier who handles goods produces them, we pointed out that there could be no such thing as goods not "produced" by the carrier, and the exemption would be meaningless.

The plaintiff now concedes, as we understand it, that the artificial definition of production has no application to

post offices and post roads, but not for the use of everyone except persons with red hair. It could not prescribe a rule of conduct to govern intrastate commerce and enforce its policy by denying the use of the mails to those who did not comply. It "may not exercise its control over the mails to enforce a requirement which lies outside its constitutional province", *Electric Bond Company* vs. *Commission*, 303 U. S. 419, 442 (1938). And while it may prohibit this or that specified kind of traffic in interstate communication by telegraph, depending on the nature of the traffic itself, it could not, we think, deny all interstate telegraph facilities to all persons who do not order their intrastate lives in accordance with congressional specifications. So Congress did *not* intend to deny child-labor employers the use of the mails, and therefore did not regard communications as goods.

The plaintiff also concedes, as we read her brief, that if a railroad company employed child labor to load a carload of freight, delivery of the freight must be arrested for thirty days, and that if it were loaded by employees paid less than the minimum wage it could never be delivered at all. These admissions are frank, and highly creditable in that they logically follow from the rest of plaintiff's argument and do not seek to confuse or evade the issue. When we point out that the plaintiff's case must stand or fall with them, we feel that there is little that we need add.

Even if the words used by Congress, read in the light of the legislative history, seemed to require such absurd conclusions, we might still fall back on the classical language of *United States* v. *Kirby*, 74 U. S. 482 (1868) at pages 486-7:

> "All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, *or an absurd consequence*. It will always, therefore, be presumed that the legislature intended exceptions to its language, which would avoid results of this character. * * * The common sense of man approves the judgment mentioned by Puffendorf, that the Bolog-

nian law which enacted, 'that whoever drew blood in the streets should be punished with the utmost severity,' did not extend to the surgeon who opened the vein of a person who fell down in the street in a fit".

Plaintiff's Comments on the Exemption of Common Carriers (Sec. 15 (a))

This exemption, discussed in our main brief (page 34), is as follows:

> " * * * no provision of this act shall impose any liability upon any common carrier for the transportation in commerce in the regular course of its business of any goods *not produced by such common carrier* * * *."

It will be noted that the privilege of the carrier is with respect to transportation, while the prohibition with respect to child labor does not mention transportation but only shipment or delivery for shipment. The prohibition with respect to goods produced in violation of the wage and hour provisions includes prohibition of transportation as well as of shipment and delivery in commerce.

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The plaintiff now concedes, as we understand it, that the artificial definition of production has no application to

goods handled by a carrier which are produced (in the ordinary sense) by the carrier's patron; and consequently that telegraph companies as well as railroad companies may ignore the child labor provisions if they do not themselves employ child labor. Apparently they concede that their position leads to the conclusion that if a railroad company did employ child labor in connection with a shipment the delivery of the shipment must be held up for thirty days, and that if a railroad company did employ anyone in violation of the wage conditions in connection with a shipment such shipment could never be delivered at all.

Apart from the absurdity of the conclusion, the error in the reasoning is manifest. Whether the railroad company or the telegraph company is engaged in production, within the meaning of the act, cannot depend on the kind of labor employed in handling the "goods". Either handling by a carrier (or transmission company) is production as Congress intended to use the term or it is not. If it is not production when no child labor is employed, the use of child labor cannot turn it into production.

The plaintiff's position is no more than this, that child labor in commerce is to be treated as prohibited although Congress expressly refused to prohibit it.

Messages Containing News

The plaintiff says that it is common knowledge that Western Union sells news in competition with others, and that therefore, even if the court accepts our contention that by "goods" Congress meant some "res" produced, transported and sold to be consumed under competitive conditions, that part of the company's business at least would be prohibited by the act while child labor is employed.

There is nothing about this in the record, and we do not see how we can properly argue about it at this late date. If it is common knowledge that some messages contain news it is certainly not common knowledge that they are the sub-

ject of competition. The point in any event requires no consideration except on the assumption that the court agrees with our principal contention that Congress did not regard communications as goods; and if that contention is sound it is more than far-fetched to assume that Congress intended to make a special exception of this particular kind of communication, of which there is nothing to suggest that it had ever heard. The plaintiff did not think of it until six years after the passage of the act, and after an exchange of arguments in three courts. Certainly Congress did not think of it in 1938.

Whatever the stipulation of facts might have shown if this matter had been discussed earlier, it may properly be assumed that the messages in question are the communication of intelligence by wire, that tariffs are filed for them as for other communications, and that whether the charges are paid by the sender or the addressee, and whether they are higher than they otherwise would be because of extra cost necessarily incurred in rendering the service, they are still essentially communications, involving no sale of consumer goods and no unfair competition in interstate trade by reason of any savings resulting from the use of child labor in other parts of the telegraph establishment.

In *Moore* v. *New York Cotton Exchange*, 270 U. S. 593, 604-605 (1926), the court had this to say:

> "It is equally clear that the contract with the Western Union for the distribution of the quotations to such persons as the New York exchange shall approve does not fall within the reach of the Anti-Trust Act. Under that contract, the exchange at its own expense, collects the quotations and delivers them to the telegraph company for distribution to such approved persons. The real distributor is the exchange; the telegraph company is an agency through which the distribution is made. In effect, the exchange hands over the quotations, as it might any other message, to the telegraph company for transmission, charges to be collected from the receivers. The payment which the telegraph company makes to

> the exchange is for the privilege of having the business. It does not alter the character of the service rendered. In furnishing the quotations to one and refusing to furnish them to another, the exchange is but exercising the ordinary right of a private vendor of news or other property. As a common carrier of messages for hire, the telegraph company, of course, is bound to carry for all alike. But it cannot be required—indeed, it is not permitted—to deliver messages to others than those designated by the sender."

Citing with approval *Matter of Renville*, 46 New York App. 37, 43-33 (1899).

All messages contain news. Usually the sender pays to have the news delivered to the addressee. Sometimes the addressee is so anxious to get the news that he arranges for it to be sent and pays for it himself. But in either case what is paid for is a communication service; there is no sale to the addressee of any property right in the news. If a resident of New Jersey wishes to be informed, round by round, of the developments in a prize fight in Chicago the news which he seeks must of necessity be manufactured in Illinois. It cannot possibly be manufactured in New Jersey. The case cannot therefore be within the scope of the evil which Congress sought to reach in the act held invalid in *Hammer* vs. *Dagenhart*, which is the same evil and the only one which Congress sought to correct here. "Thus, if one State desired to limit the employment of children", argued the Solicitor General in *Hammer* vs. *Dagenhart* (247 U. S. at page 254) "it was met with the objection that its manufacturers could not compete with manufacturers of a neighboring State which imposed no such limitation. The shipment of goods in interstate commerce by the latter, therefore, operates to deter the former from enacting laws it would otherwise enact for the protection of its own children." New Jersey would not be deterred from enacting stricter child labor laws because of any fear that its residents would be ruined by a lowering of the rates for the

transmission of sporting news by ticker from Chicago, even if it could be supposed that the presence or absence of child labor in the delivery of ordinary messages would in any way affect those rates.

The plaintiff's brief cites cases to the effect that the prohibitions of the act are not confined to competitive situations, and of course there is no dispute about that where the wage and hour provisions are involved and there is a direct prohibition of employment in commerce in violation of those provisions. The prohibition of transportation in commerce of goods so produced is merely an additional sanction, beyond the criminal penalties, to assure observance of the prohibition expressly imposed. As to child labor there was no prohibition of employment, and the only evil to be remedied was unfair competitive advantage in interstate trade.

Plaintiff's Comments on the Legislative History

We find nothing in the plaintiff's brief which answers or weakens the argument in our main brief based on a full analysis of the legislative history. The Senate Committee on Education and Labor appears to have been for a time at least in general sympathy with the design of the House. But the Senate by an overwhelming vote refused to follow the recommendation of that committee and instead adopted the recommendations of the Committee on Interstate Commerce. The whole history of the legislation, commencing with the President's message, shows that the only child labor provision which survived was intended to re-enact and re-submit to this court the prohibition which had been held invalid in *Hammer* vs. *Dagenhart*. That provision (39 Stat. 675) certainly did not apply to telegrams. That prohibition also was addressed only to a producer, manufacturer, or dealer, and there was no artificial definition of those terms. So far as child labor was concerned, the Senate, from first to last, insisted on re-submitting the

Hammer-Dagenhart issue and also insisted with equal firmness on doing nothing more. Not one other thing. And the Senate was sustained by the conference report and by Congress.

In the definition of "goods" the insertion of "articles or subjects of commerce of any character" was not made by the Conference Committee, and did not represent any compromise between House and Senate as to the prohibition of child labor. It was inserted in the original bills early in their history, at a time when the bills prohibited child labor in commerce, and could not have been designed to affect the operations of a telegraph company, which were otherwise covered by the bills as to child labor as well as wages and hours. The Act of 1916 (39 Stat. 675) had not contained the word "goods" but had enumerated "any article or commodity the product of any mine or quarry" or "the product of any mill, cannery, workshop, factory or manufacturing establishment." "Articles or subjects of commerce of any character" was more comprehensive, and no doubt intended to be; but the prohibition still did not apply to them unless they were subjects of commerce which are "shipped", and therefore, whether we give any weight or not to the principle of *ejusdem generis*, they do not include communications.

The Reference to "Transportation" in *Telegraph Company* vs. *Texas*, 105 U. S. 460, 464 (1881)

This court did say:

> "A telegraph company occupies the same relation to commerce as a carrier of messages, that a railroad company does as a carrier of goods. Both companies are instruments of commerce, and their business is commerce itself. They do their transportation in different ways, and their liabilities are in some respects different, but they are both indispensable to those engaged to any considerable extent in commercial pursuits."

The use of the word "transportation" is obviously a metaphor. The question was whether a telegraph company was engaged in commerce and whether under the Post Roads Act it was an agent of the United States in sending Government messages. The question was not whether the transmission of telegrams was included in a statute prohibiting transportation or shipment.

Conclusion

In concluding this reply it may be appropriate to quote the following from *Kirschbaum Co.* v. *Walling*, 316 U. S. 517, at 521-522 (1942):

> "We cannot, therefore, indulge in the loose assumption that, when Congress adopts a new scheme for federal industrial regulation, it thereby deals with all situations falling within the general mischief which gave rise to the legislation. Such an assumption might be valid where remedy of the mischief is the concern of only a single unitary government. It cannot be accepted where the practicalities of federalism—or, more precisely, the underlying assumptions of our dual form of government and the consequent presuppositions of legislative draftsmanship which are expressive of our history and habits—cut across what might otherwise be the implied range of the legislation. Congress may choose, as it has chosen frequently in the past, to regulate only part of what it constitutionally can regulate, leaving to the States activities which, if isolated, are only local. One need refer only to the history of Congressional control over the rates of intrastate carriers which affect interstate commerce, and the amendment of August 11, 1939, to the Federal Employers' Liability Act, extending the scope of that Act to employees who 'shall, in any way directly or closely and substantially, affect' interstate commerce, 53 Stat. 1404. Compare *Federal Trade Commission* v. *Bunte Bros.*, 312 U. S. 349. The history of Congressional legislation regulating not only interstate commerce as such but also activities intertwined with it, justi-

fied the generalization that, when the Federal Government takes over such local radiations in the vast network of our national economic enterprise and thereby radically readjusts the balance of state and national authority, *those charged with the duty of legislating are reasonably explicit and do not entrust its attainment to that retrospective expansion of meaning which properly deserves the stigma of judicial legislation.*" (Emphasis supplied.)

The decree should be reversed and the complaint dismissed.

Respectfully submitted,

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No. 847 49

In the Supreme Court of the United States

OCTOBER TERM, 1943

THE WESTERN UNION TELEGRAPH COMPANY, PETITIONER

v.

KATHARINE F. LENROOT, CHIEF OF THE CHILDREN'S BUREAU, UNITED STATES DEPARTMENT OF LABOR

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The opinion of the district court (R. 24–39) is reported in 52 F. Supp. 142. The opinion of the circuit court of appeals (R. 46–51) is not yet reported.

QUESTION PRESENTED

Whether petitioner ships in commerce "goods" "produced" in establishments in or about which oppressive child labor is employed, within the meaning of the Fair Labor Standards Act of 1938.

STATUTE INVOLVED

Sections 3 (i) and 12 (a) of the Fair Labor Standards Act of 1938, 52 Stat. 1060, 29 U. S. C., sec. 201, which are the statutory provisions chiefly involved, read as follows:

> SEC. 3. As used in this Act—
>
> * * * * *
>
> (i) "Goods" means goods (including ships and marine equipment), wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof, but does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof.
>
> * * * * *
>
> (j) "Produced" means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof, in any State.
>
> * * * * *
>
> SEC. 12. (a) After the expiration of one hundred and twenty days from the date of enactment of this Act, no producer, manufacturer, or dealer shall ship or deliver for

shipment in commerce any goods produced in an establishment situated in the United States in or about which within thirty days prior to the removal of such goods therefrom any oppressive child labor has been employed: *Provided,* That a prosecution and conviction of a defendant for the shipment or delivery for shipment of any goods under the conditions herein prohibited shall be a bar to any further prosecution against the same defendant for shipments or deliveries for shipment of any such goods before the beginning of said prosecution.

* * * * *

STATEMENT

This case arises upon a complaint filed by respondent, the Chief of the Children's Bureau, United States Department of Labor, to restrain petitioner from violating Sections 12 (a) and 15 (a) (4) of the Fair Labor Standards Act. The facts, which were stipulated (R. 9–16), may be summarized as follows:

1. *Business of Defendant.*—Petitioner is engaged in the transmission and delivery of telegraph messages throughout the United States and in foreign countries (R. 9). It operates some 3,100 public telegraph offices located in large and small communities at which messages are received from the public over-the-counter, by telephone, by telegraphic tie lines, and from petitioner's messengers who call for messages at its patrons' request (R. 9–10).

In the public offices petitioner's employees do considerable work on the messages before transmitting them. They write on the appropriate telegraph blanks all messages received by telephone and some received over-the-counter (R. 10). Frequently, petitioner's employees correct misspelled or illegible words, combine or separate words where necessary, and, with the senders' permission, clarify or shorten messages by changing, adding, or subtracting words (R. 11). Symbols are placed on all messages to show the date and time of filing, the number of words, the class of telegraph service and the charge (R. 11).

The messages are then sent to a message center in the same community for transmission to their destination. In many instances an employee in the public office transforms the written message into electric impulses which flow through a telegraphic circuit connecting the public office with the center and cause a teleprinter in the center to reprint the message. (R. 11–12.) In other public offices the original message with the notations added by petitioner's employees is itself placed in a carrier capsule which is delivered to the message center through a pneumatic tube (R. 11–12).

At the message center the messages are routed by writing on each form the name or symbol of the proper outgoing circuit, and they are then dispatched to the appropriate message centers in other cities by means of teleprinter, multiplex

printer or Morse code (R. 12–14). From the second center the messages are transmitted to public offices for delivery and delivery is made to the addresses, usually by messengers employed in the public offices (R. 15). The carriage is then complete.

A substantial proportion of the telegraph messages originating at each of the offices of petitioner is transmitted by petitioner in interstate commerce before delivery (R. 15). In most instances the movement across State lines occurs during transmission between message centers, but some messages originating at a public office near State lines move across a State line during their transmission to or from a message center (R. 15).

2. *Oppressive child labor.*—Approximately 15,000 telegraph messengers are employed in petitioner's public office to collect and deliver telegraph messages (R. 10). The large majority use bicycles in the performance of their work (R. 10) but petitioner also employs messengers to collect and deliver messages on foot and in motor vehicles (R. 10).

Since January 1, 1941, petitioner has employed as telegraph messengers in its public offices many minors under 16 years of age and also, since January 1, 1942, has employed many minors between 16 and 18 years of age as drivers of motor vehicles (R. 15–16). Such employment constitutes oppressive child labor within the meaning of Section 3 (l) of the Act and Child Labor Order

No. 2 issued thereunder (Title 29, c. 4, Code of Federal Regulations, 1939 Supp., Part 422, sec. 422.2).

3. *Proceedings below.*—The district court ruled that petitioner was violating Sections 12 (a) and 15 (a) (4) of the Act by shipping in interstate commerce goods produced in establishments in or about which oppressive child labor was employed (R. 24–39). Accordingly, the district court entered a judgment restraining petitioner from shipping in interstate commerce telegraph messages produced by petitioner in any of its public offices in or about which oppressive child labor had been employed within 30 days of such transmission (R. 40–41). On appeal, the Circuit Court of Appeals for the Second Circuit affirmed the judgment of the district court (R. 51).

ARGUMENT

Section 12 (a) of the Fair Labor Standards Act provides:

> * * * no producer, manufacturer, or dealer shall ship or deliver for shipment in commerce any goods produced in an establishment situated in the United States in or about which * * * oppressive child labor has been employed * * *.

Admittedly, petitioner's conduct constitutes "oppressive child labor" within the meaning of Section 3 (l), if the Act applies to it. It is not denied that the public offices are establishments.

The only issue presented to the courts below was whether petitioner is a "producer" within Section 12 (a) and "ships" in commerce "any goods." Messages containing ideas, orders and intelligence are composed, handled and worked on in petitioner's public offices; there they are transformed into electric impulses and conveyed to other States. Both courts below, although they conceded that telegraph messages are not "goods" and are not "produced" by petitioner in the colloquial sense of those words, held without dissent that such messages are "goods" and such handling is "production" within the express statutory definitions that Congress supplied. We submit that this decision is plainly correct.

1. (a) As a matter of textual analysis it is clear that Section 12 (a) applies to petitioner's activities. The colloquial meaning of the words must give way to the statutory definitions. *Fox* v. *Standard Oil Co.*, 294 U. S. 87. Section 3 (i) provides that as used in the Act—

> "Goods" means goods (including ships and marine equipment), wares, products, commodities, merchandise, or articles or subjects of commerce of any character * * *.

A message may be a "subject of commerce." Long prior to the enactment of the Act, this Court had recognized that news, ideas and intelligence move in interstate commerce no less than tangible articles of trade. *Gibbons* v. *Ogden*,

9 Wheat. 1, 229–230 (per Mr. Justice Johnson); *International Textbook Co.* v. *Pigg*, 217 U. S. 91, 106–107; *Indiana Farmer's Guide Co.* v. *Prairie Co.*, 293 U. S. 268, 276; *Associated Press* v. *National Labor Relations Board*, 301 U. S. 103, 128–129. And in *Western Union Telegraph Co.* v. *Pendleton*, 122 U. S. 347, 356, the Court had held that the "ideas, wishes, orders, and intelligence" embodied in messages are the "subjects" of the interstate commerce in which petitioner is engaged. As the court below suggested, these decisions do not demonstrate that the term "subjects of commerce" was used in the Act to include messages. But the decisions do show that the term is appropriate for that purpose, and Section 3 (i) itself shows that here the term was used in its broadest sense to embrace everything that might be a subject of interstate commerce. This is manifest not only from the sweep of the words—it would be difficult to conceive a broader definition—but also from the concluding phrase "subjects of commerce *of any character*,"[1] which expressly negatives the suggestion that only some kinds of subjects of commerce are included.

In the lower courts petitioner argued that messages are not "goods" because they are intangible. The dichotomy "articles or subjects" indicates, however, that the draughtsman had the contrast, tangible or intangible, squarely in mind; and the

[1] Italics supplied.

action of the Senate Committee in adding the word "subjects" to a definition which already included all the other descriptive nouns now in Section 3 (i) can be attributed only to the desire of the Committee to include every subject of commerce which Congress had power to reach, whether tangible or not. S. 2475, Committee Print to accompany S. Rept. 884, 75th Cong. 1st Sess.

Petitioner, therefore, has abandoned the contention that the definition covers only tangible goods, but now contends for the first time that its scope is limited to goods "produced, transported and sold to be consumed, in competition or potential competition with other sales of similar products" (Pet. 15). This new contention is utterly lacking in merit for three reasons. First, it is well settled that the subjects of interstate commerce are not limited to articles of commercial competition. See *Walling* v. *Haile Gold Mines*, 136 F. (2) 102 (C. C. A. 4) and cases cited. Second, it is a matter of common knowledge that petitioner does in fact carry messages containing reports, news and other intelligences which are the subject of trade. Third, the words of Section 3 (i) and its legislative history show that no limitation on the word "subjects" of commerce was intended (see p. 8, *supra*).

(b). The Act also makes clear that petitioner "produces" goods within the meaning of Section 12 (a). As the courts have repeatedly recog-

nized,[2] the Act effectively expands the term "produced" beyond its normal connotations; Section 3 (j) provides:

> "Produced" means produced, manufactured, mined, handled, or in any other manner worked on * * *.

Petitioner's entire argument on this point is devoted only to showing that "handling" by a carrier—transportation—does not constitute "production" (Pet. 15–16). We may assume the correctness of this interpretation, as did the court below. Petitioner does not merely transport messages. Petitioner's employees in its public offices aid in the composition of the messages, and mark and handle the forms on which they are written. They transform sounds into writing, writing into electric impulses, and impulses back into writing. To assist in the composition of a message and to transform it in order to send it rapidly is certainly to "work on" the message and even is to "produce" it in the ordinary sense, whether the message is regarded as the intelligence or the media in

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[2] *Bracey* v. *Luray*, 138 F. (2d) 8 (C. C. A. 4); *Fleming* v. *Kenton Loose Leaf Tobacco Warehouse Co.*, 41 F. Supp. 255 (E. D. Ky.); *Fleming* v. *Atlantic Co.*, 40 F. Supp. 654 (N. D. Ga.), affirmed, *Atlantic Co.* v. *Walling*, 131 F. (2d) 518 (C. C. A. 5). See also *Rahgo* v. *Cities Service Oil Co.*, 177 Misc. 1059, 33 N. Y. S. (2d) 42 (Munic. Ct. N. Y. City, 1942); *Campbell* v. *Mandel Auto Parts Corp.*, 31 N. Y. S. (2d) 656 (Sup. Ct. N. Y., N. Y. Co., 1941); *Gaskin* v. *Clell Coleman and Sons*, 5 Wage Hour Rept. 581, 584 (C. C. Ky. Mercer Co., 1942). Contra, *James V. Reuter, Inc.* v. *Walling*, 137

which it is conveyed.[3] Likewise, to mark a written message to show the charges and time of transmittal and receipt is to "handle" it. The messages, therefore, are "produced" in petitioner's establishments by its employees and the petitioner is a "producer" within the meaning of the Act.

(c) It is equally clear that the messages are "shipped" by petitioner within the meaning of Section 12. The verb "ship" is an imprecise word meaning little more than "send." In its purest sense, it is true, it means to put aboard a vessel, but plainly that is not the meaning here. Beyond that "ship" means simply to transport or convey, or to cause to be transported or conveyed. Cf. Webster's New International Dictionary (2d ed.). Certainly, petitioner "conveys" messages, and it does no violence to language to say, as the Court has done, that it "transports" them. *Western Union Tel. Co.* v. *Texas*, 105 U. S. 460, 464. The word takes its color here from the express definition of "goods"; and since the messages are

F. (2d) 315 (C. C. A. 5), certiorari granted November 22, 1943, and judgment vacated April 10, 1944, No. 436, this Term.

[3] There is, of course, no difficulty of usage in speaking of a message as a thing produced. Compare, for example, *United States* v. *The Associated Press*, no. 19-163, S. D. N. Y., Oct. 6, 1943; *International News Service* v. *Associated Press*, 248 U. S. 215, 253, 254 (Mr. Justice Brandeis, dissenting). And the Act itself uses the word with reference to the child labor provisions to cover the production of intangible goods. Section 13 (c) provides:

"The provisions of section 12 relating to child labor shall not apply with respect * * * to any child employed as an actor in * * * theatrical productions."

"goods," there can be no doubt that petitioner "ships" them in interstate commerce when its employees send them across State lines.

2. The decision below also gives proper effect to the legislative history of Section 12 (a). When the bill that became the Fair Labor Standards Act was introduced, there was general agreement that Congress should eliminate child labor wherever federal power would reach. In his message to Congress, the President condemned without limitation the employment of children: "A self-supporting and self-respecting democracy can plead no justification for the existence of child labor * * *" (H. Doc. 255, 75th Cong., 1st sess., p. 2). In the hearings, the testimony developed a program of abolishing child labor and its products from the national sphere by statute and from the intrastate realm by pressing the proposed constitutional amendment. *Joint Hearings before the Senate Committee on Education and Labor and the House Committee on Labor on S. 2475 and H. R. 7200*, pp. 390–391, 396–402. On the floor, it was said without contradiction that the Act would eliminate child labor from industry. E. g. 83 Cong. Rec. 9263–9264. The problem confronting both the President and Congress was not whether or how far child labor should be eliminated from industries subject to federal regulation; it was, how far does federal power reach and how can it be used most effectively to abolish the evil. Common sense repels the suggestion that

Congress intended to eliminate the employment of children from the manufacturing of goods for commerce—then of doubtful constitutionality (*Hammer* v. *Dagenhart*, 247 U. S. 251)—and to leave unimpaired the equal evil of child labor in those activities constituting interstate commerce proper which fall within the broad statutory definition of production of goods—activities peculiarly within the competence of Congress to regulate.

The course of the bill through Congress is consistent with this conclusion. Prior to the conference report every print except one prohibited the employment of oppressive child labor in commerce—more than twenty prints including reports by the House and Senate committees. There was no such provision, it is true, in the bill in the form in which it first passed the Senate, but this exception is not material for present purposes because the Senate bill proceeded on the theory, later rejected, that Congress should not set its own standards for child labor but should merely supplement State laws by prohibiting interstate sales of goods made by children under conditions outlawed by the State of destination (81 Cong. Rec. 7949–7951).[4] Opinion was apparently unanimous that if Congress was to set a single national minimum stand-

[4] These provisions were based on the theory of the convict-made goods Act sustained in *Ky. Whip & Collar Co.* v. *I. C. R. Co.*, 299 U. S. 334.

ard it should do it both for the production of goods for commerce and for commerce itself.

The child labor provisions of the Senate bill, as we have said, proceeded on the theory that Congress should merely supplement State laws. The House bill, on the contrary, established minimum national standards for establishments engaged in production for commerce, and for employment in commerce in industries affecting commerce. Section 10 (a) contained the provisions that became Section 12 (a) of the Act. Section 10 (b) provided:

> No employer engaged in commerce in any industry affecting commerce shall employ any employee under any oppressive child labor condition.

At that time, therefore, both Section 10 (a) and 10 (b) covered petitioner.

The first issue before the Conference Committee was whether to accept the theory of the Senate bill or that of the House. The provisions of the House bill were supported by the chief proponents of child labor legislation on the ground that child labor would be eliminated more quickly and enforcement made easier if an act establishing a national minimum age standard were adopted rather than a law based on conflicting State requirements.[5] Those provisions,

[5] Joint hearings before the Senate Committee on Education and Labor and the House Committee on Labor on S. 2475 and H. R. 7200. Testimony of Mrs. Larue Brown,

Sections 3 (m) and 10 (a) of the House bill, were made the basis for the conference report and are now Sections 3 (l) and 12 (a) of the Act. Accordingly, there is no merit in petitioner's argument—on which its petition for certiorari is pitched—that Congress did not establish any national policy concerning child labor. Congress did establish such a standard; it rejected the entire theory of the Senate bill. The Conference Committee expressly stated that the conference agreement, with one exception presently to be noted, "adopts the child labor provisions of the House amendment" (see p. 16 *infra*).

The second issue before the Conference Committee affecting the child labor provisions was common to the entire bill. The theory of the House bill, running through the wage, the hour and the child labor provisions equally, was that the legislation should apply to employment in commerce in any industry found by the Secretary of Labor to be an industry "affecting commerce" according to criteria supplied by Section 6 of the bill. The Conference Committee, however, decided to eliminate all attempts to regulate conditions of employment in commerce in industries found by the Secretary of Labor to be industries

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representing the National League of Women Voters, pp. 390–391, of Mr. Courtenay Dinwiddie, General Secretary, National Child Labor Committee, pp. 399–400; statements of the National Federation of Business and Professional Women's Clubs, Inc., by Mrs. Opal D. David, p. 395.

affecting commerce. Its purpose was to eliminate the broad delegation of administrative discretion to determine the scope of the regulation. The change was made first in the wage and hour provisions, which became Sections 6 and 7, and they were confined to employment "in commerce" or "in the production of goods for commerce." The Conference Committee then struck out from the child labor provisions of the House bill subsection 10 (b) quoted above. It did so for the same reason that it limited the wage and hour provisions. The Conference Report states (H. Rept. 2738, 75th Cong., 3d sess., p. 32):

> Section 12 of the conference agreement adopts the child labor provisions of the House amendment, with one exception. In view of the omission from the conference agreement of the principle of section 6 of the House amendment [the regulation of industries found by the Secretary to affect commerce], subsection (b) of section 10 of the House amendment has been omitted.

In other words the only change intended to be made in the House bill was to omit the proposed grant of power to the Secretary to determine and regulate the industries affecting commerce. In all other respects the single national standard proposed in the House bill prevailed.

There is no clear explanation of the Committee's failure to put back into the conference agreement some express regulation of child labor in

commerce as such. It may have been inadvertence. More probably it was the belief that the statutory definitions of "goods" and "produced" coupled with the establishment test[6] were themselves broad enough to cover commerce itself in every important case, and that enforcement would be simplified if coverage were tested by whether the "establishment" was engaged in the production of "goods," under the unusually broad statutory definitions, rather than by an inquiry into the character of each individual's employment.[7] But whatever the explanation, the history is clear that the omission of such a provision was not the result of a deliberate intent not to regulate the employment of child labor in interstate commerce.

In view of the beneficent purposes of the Act and the evident intention of Congress, the courts should not now narrow the statutory definitions of "produced" and "goods" in order to render Section 12 (a) inapplicable to establishments nor-

[6] It should be noted that the child labor provisions determine coverage on an establishment basis rather than on the basis of the employment of each individual employee. This contrasts with the test set up in the wage and hour provisions and is another indication of the broad scope intended in Section 12.

[7] Hearings before the Committee on Interstate Commerce, U. S. Senate, 75th Cong., 1st sess., on S. 592, S. 1976, S. 2068, S. 2226, and S. 2345, May 12, 18, 20, 1937, comment of Senator Barkley, P. 128; testimony of Mr. Courtenay Dinwiddie, General Secretary, National Child Labor Committee, pp. 98–99.

mally regarded as engaged in commerce rather than in the production of goods. On the contrary, the occasion requires that the words be given the full scope of the definitions which Congress supplied, in order to gain the end which Congress believed it had achieved. This is not to extend the Act by implication; as we have shown above (pp. 7–11, *supra*), our construction gives the definitions only the natural and established meaning of their words.

3. Petitioner dwells at some length on the form of the district court's decree. The decree (R. 41) restrains it from—

> Transmitting in interstate commerce * * * telegraph or other messages or any other goods produced by or for defendant * * * in any establishment * * * in or about which within thirty (30) days prior to the transmission or other removal of such messages or other goods therefrom, there shall have been employed * * * any oppressive child labor * * *.

Petitioner states that this is an "injunction which neither the plaintiff nor the court could possibly permit to be obeyed" (Pet. 7, cf. Pet. 3).

We cannot agree. Except for the initial 30-day period, compliance with the injunction will require petitioner to do nothing except cease the oppressive employment of children whom Congress has declared too young to work (Section 3 (l)). In the future, petitioner may protect itself against

any unwitting violations of the Act or the decree by requiring all minors to present certificates of age (Section 3 (l)). It may even be that the 30-day period will present no problem, for some time will elapse before the mandates go down in which petitioner may discharge all underage children in its employ and the 30-day period may then elapse before the decree becomes effective. But if the period intervening before the decree becomes effective is not long enough to enable petitioner to make a reasonable adjustment of its employment practices, then either the circuit court of appeals or the district court may properly stay the injunction further in order to permit the transmission of messages until petitioner has a reasonable time to comply. See *Standard Oil Co.* v. *United States,* 221 U. S. 1, 81; *United States* v. *American Tobacco Co.,* 221 U. S. 106, 187–188. Petitioner's fears are therefore unreal. There need be no interruption of its business. The Government expects, and we believe both courts below expected, that petitioner will comply with the Act and with the injunction once its obligations have been finally determined.

CONCLUSION

There can be no doubt of the importance of petitioner's operations or of the significance to it of the question presented in the instant case. Moreover, the interpretation of the definitions of

"goods" and "produced" has considerable importance in the administration of the Act. But, although for these reasons we do not urge that the petition for certiorari should be denied, it is our opinion that the decision below does not require review by this Court. For the reasons that we have stated, it is plainly correct. Since the petitioner is the only company directly affected, the decision of the circuit court of appeals will lay the issue at rest. Consequently the petition for certiorari may properly be denied.

Respectfully submitted.

CHARLES FAHY,
Solicitor General.

DOUGLAS B. MAGGS,
Solicitor.

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No. 49

In the Supreme Court of the United States

OCTOBER TERM, 1944

THE WESTERN UNION TELEGRAPH COMPANY,
PETITIONER

v.

KATHARINE F. LENROOT, CHIEF OF THE CHILDREN'S BUREAU, UNITED STATES DEPARTMENT OF LABOR

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT

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BRIEF FOR RESPONDENT

OPINIONS BELOW

The opinion of the district court (R. 17–30) is reported in 52 F. Supp. 142. The opinion of the circuit court of appeals (R. 34–39) is reported in 141 F. (2d) 400.

QUESTION PRESENTED

Whether, within the meaning of the Fair Labor Standards Act of 1938, petitioner ships in interstate commerce "goods" "produced" in its telegraph offices.

STATUTE INVOLVED

Sections 3 (i), 3 (j), and 12 (a) of the Fair Labor Standards Act of 1938 (52 Stat. 1060, 29 U. S. C. 201), are the statutory provisions chiefly involved. They read as follows:

SEC. 3. As used in this Act—

* * * * *

(i) "Goods" means goods (including ships and marine equipment), wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof, but does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof.

(j) "Produced" means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof, in any State.

* * * * *

SEC. 12. (a) After the expiration of one hundred and twenty days from the date of enactment of this Act, no producer, manufacturer, or dealer shall ship or deliver for

shipment in commerce any goods produced in an establishment situated in the United States in or about which within thirty days prior to the removal of such goods therefrom any oppressive child labor has been employed: *Provided*, That a prosecution and conviction of a defendant for the shipment or delivery for shipment of any goods under the conditions herein prohibited shall be a bar to any further prosecution against the same defendant for shipments or deliveries for shipment of any such goods before the beginning of said prosecution.

* * * * *

STATEMENT

This case arises upon a complaint filed by respondent, the Chief of the Children's Bureau, United States Department of Labor, to restrain petitioner from violating the child labor provisions of the Fair Labor Standards Act. The facts, which were stipulated (R. 6–12), may be summarized as follows:

1. *Business of Defendant.*—Petitioner is engaged in the transmission and delivery of telegraph messages throughout the United States and in foreign countries (R. 6). It operates public telegraph offices located in large and small communities at which messages are received from the public over-the-counter, by telephone, by telegraphic tie lines, and from petitioner's messengers who call for messages at its patrons' request (R. 6–7).

In the public offices petitioner's employees handle and work on the messages before transmitting them. They write on the appropriate telegraph blanks all messages received by telephone and some received over-the-counter. (R. 7–8.) In some cases, petitioner's employees correct misspelled or illegible words, combine or separate words where necessary, and, with the senders' permission, clarify or shorten messages by changing, adding, or subtracting words (R. 8). Symbols are placed on all messages to show the date and time of filing, the number of words, the class of telegraph service and the charge (R. 8).

The messages are then sent to a message center in the same community for transmission to their destination. This is done in one of two ways. In many instances an employee in the public office transforms the written message into electric impulses which flow through a telegraphic circuit connecting the public office with the center and cause a teleprinter in the center to reprint the message. (R. 8–9.) In other public offices the original message with the notations added by petitioner's employees is itself placed in a carrier capsule which is delivered to the message center through a pneumatic tube (R. 9).

At the message center the messages are routed by writing on each form the name or symbol of the proper outgoing circuit, and they are then dispatched to the appropriate message centers in other cities by means of teleprinter, multi-

plex printer or Morse code (R. 9–11). From the second center the messages are transmitted to public offices for delivery. Usually delivery to the addressees is made by messengers employed in the public offices. (R. 11.) The carriage is then complete.

A substantial proportion of the telegraph messages originating at each of the offices is transmitted by petitioner in interstate commerce before delivery (R. 11).

2. *Oppressive child labor.*—Approximately 15,000 telegraph messengers are employed in 3,100 of petitioner's public offices to collect and deliver telegraph messages (R. 7). The large majority use bicycles in the performance of their work but petitioner also employs messengers to collect and deliver messages on foot and in motor vehicles (R. 7).

Under section 3 (l) of the Fair Labor Standards Act the employment of children less than 16 years old is oppressive child labor. Under Child Labor Order No. 2, which was issued by the Chief of the Children's Bureau pursuant to the authority granted by section 3 (l), it is also oppressive child labor to employ children under 18 as drivers of motor vehicles (Code of Federal Regulations, 1939 Supp., Title 29, c. 4, Part 422, sec. 422.2). Nevertheless, petitioner employs many children less than 16 years old in its public offices as messengers, and many others between

16 and 18 years old as drivers of motor vehicles (R. 11–12).

Proceedings below.—The district court ruled that the transmission in interstate commerce of telegrams originating in public offices in which oppressive child labor is employed is a violation of Section 12 (a) of the Fair Labor Standards Act (R. 17–30). Accordingly, the district court entered a judgment restraining petitioner from shipping in interstate commerce telegraph messages produced by petitioner in any of its public offices in or about which oppressive child labor had been employed within 30 days of such transmission (R. 30–32).

On appeal, the Circuit Court of Appeals for the Second Circuit affirmed the judgment of the district court (R. 39).

SUMMARY OF ARGUMENT

Petitioner concedes that oppressive child labor is employed at its public offices. Its only contention is that "goods" are not "produced" there within the meaning of Section 12 and that it does not "ship" anything in interstate commerce.

Whatever the normal connotations of "goods" and "produced," their meaning in Section 12 is controlled by the statutory definitions which Congress supplied. Section 3 (i) defines "goods" to include "articles or subjects of commerce of any character." In both common and legal usage

the "ideas, wishes, orders, and intelligence" (*Western Union Tel. Co.* v. *Pendelton*, 122 U. S. 347, 356) carried by petitioner are "subjects" of interstate commerce; and the broad sweep of the words as well as the legislative history shows that in this Act the term "subjects of commerce" was used in its broadest sense. Likewise, the definition of "goods" clearly comprehends the regulated electric impulses into which the messages are converted for transmission to other States.

Section 3 (j) defines "produced" to include "handled, or in any other manner worked on." Petitioner's employees in its public offices aid in the composition of messages, write them on blanks, mark the written messages, and transform them into electric impulses before sending them in commerce. Thus, they "work on" and "handle" the "goods" in the most literal sense.

Likewise, the "goods" are "shipped" by petitioner. "Ship" is a colorless word meaning nothing more than to transport or to send. The Act does not define it, and in Section 12, therefore, "ship" must take its color from the express definitions of "goods" and "produced". Since they clearly apply to petitioner's activities, "ship" must also be given a meaning which is applicable. Certainly petitioner sends messages and it is correct also to say, as this Court has done, that it transports them. *Western Union Tel. Co.* v. *Texas*, 105 U. S. 460, 464.

The legislative history of the child labor provisions of the Act requires that the statutory definitions be given full scope. Nothing in the hearing or debates indicates that the Congress intended to exempt the communications industry; consequently no such exemption can be read into the Act.

Petitioner's argument rests entirely on the absence of an express prohibition against the employment of children in establishments ordinarily regarded as engaged in commerce as distinguished from production. The legislative history of the Act demonstrates, however, that the omission is not indicative of Congressional purpose to exclude from the coverage of the child labor provisions establishments engaged both in commerce and in production of goods as defined by the Act.

ARGUMENT

PETITIONER IS VIOLATING SECTION 12 (a) OF THE FAIR LABOR STANDARDS ACT

Section 12 (a) of the Fair Labor Standards Act provides:

> * * * no producer * * * shall ship or deliver for shipment in commerce any goods produced in an establishment * * * in or about which * * * oppressive child labor has been employed * * *.

Admittedly, oppressive child labor has been and is employed in and about petitioner's offices. Congress unquestionably has constitutional power to reach it; for petitioner is engaged in interstate commerce. *Pensacola Tel. Co.* v. *Western Union Tel. Co.*, 96 U. S. 1; *United States* v. *Darby*, 312 U. S. 100. It is not denied that the public offices described above are "establishments." Consequently, the only issues presented are whether any "goods" are "produced" in the public offices, and whether petitioner is a "producer" who "ships" "goods" in interstate commerce within the meaning of the Act.

We submit that the courts below were correct in answering these questions affirmatively. Messages containing ideas, orders, and intelligence are worked on in petitioner's offices and sent to addressees in other States. Petitioner pitches its case on the argument that it is engaged in commerce and not in the production of goods. We shall show, however, that such messages are "goods" and such handling is "production" under the express definitions contained in the Act. The colloquial meaning, if different, must give way to the express statutory definitions which Congress has supplied. *Fox* v. *Standard Oil Co.*, 294 U. S. 87. Moreover, both the remedial purposes of the Act and its legislative history show that Congress intended the express definitions to be given full effect.

A. BY EXPRESS STATUTORY DEFINITION THE MESSAGES HANDLED OR WORKED ON BY PETITIONER AND THE ELECTRICAL IMPULSES INTO WHICH THEY ARE CONVERTED ARE FOR THE PURPOSES OF SECTION 12 (A) "GOODS" "PRODUCED" BY IT AND "SHIPPED" IN COMMERCE

1. *The messages and electrical impulses transmitted by petitioner are "goods"*

Section 3 (i) provides that as used in the Act—

> "Goods" means goods (including ships and marine equipment), wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof * * *.

It is our position that (a) the ideas, wishes, and orders which petitioner transmits and (b) the regulated electric impulses into which it converts the messages for transmission are both subjects of commerce within this definition.

(a) It would seem too clear for argument that a message may be a "subject of commerce." In *Gibbons v. Ogden*, 9 Wheat. 1, 229–230, Mr. Justice Johnson termed intelligence a commodity, and referred to it as a "subject" of commerce, saying:

> Commerce, in its simplest signification, means an exchange of goods; but in the advancement of society, labor, transportation, intelligence, care, and various mediums of exchange, become commodities and enter into commerce; the subject, the vehicle, the agent, and their various operations, become the objects of commercial regulation.

Before this Act became law, the Court had recognized in other leading cases that news, ideas, and

intelligence move in interstate commerce no less than tangible articles of trade. *International Textbook Co.* v. *Pigg*, 217 U. S. 91, 106–107, *Indiana Farmer's Guide Co.* v. *Prairie Co.*, 293 U. S. 268, 276; *Associated Press* v. *National Labor Relations Board*, 301 U. S. 103, 128–129. Specifically, in cases involving telegraph companies the Court had said that the messages passing over telegraph wires "constitute a portion of commerce itself" (*Western Union Tel. Co.* v. *James*, 162 U. S. 650, 654) and that "ideas, wishes, orders, and intelligence" are the "subjects" of the interstate commerce in which telegraph companies engage (*Western Union Tel. Co.* v. *Pendleton*, 122 U. S. 347, 356).

The term "subjects of commerce" may, therefore, have been used in the Fair Labor Standards Act to include messages; the decisions referred to show that the term is appropriate for that purpose. That it was so used is apparent from Section 3 (i) itself. The wording of the definition demonstrates that the term was used in this Act in its broadest sense, that it was intended to embrace everything that might be a subject of interstate commerce. This is manifest not only from the sweep of the words—it would be difficult to conceive a broader definition—but also from the concluding phrase "articles or subjects of commerce of any character," which expressly negatives the suggestion that only some kinds of subjects of commerce are included.

The legislative history of Section 3 (i) also proves that Congress used the term "subjects of commerce" in the broadest possible sense. When the Black-Connery Bill was introduced, it defined "goods" as "goods, wares, products, commodities, merchandise or articles of trade of any character" (Section 2 (a) (21) of S. 2475 and of H. R. 7200, 75th Cong., 1st sess.). The Senate Committee on Education and Labor changed "trade" to "commerce" and added the words "or subjects" after the word "articles," thus putting the definition into its present form. See S. 2475, Committee Print to Accompany S. Rep. 884, 75th Cong., 1st Sess. This deliberate insertion cannot be viewed as without significance. It constitutes, as the court below held (R. 37), "unmistakable evidence of a purpose to extend the definition of subdivision (i) to everything which had been considered a 'subject of commerce': that is, to whatever Congress could regulate as such a subject." Plainly, telegraphic messages are such a subject and are therefore "goods" within the meaning of the Act.

(b) It is equally plain that the electric impulses into which the sender's words are transformed are "subjects of commerce" and therefore "goods" within the meaning of the Act. Electric power is a commodity and a subject of commerce. *Utah Power & L. Co.* v. *Pfost*, 286 U. S. 165; cf. *Fisher's Blend Station* v. *State Tax Comm.*, 297 U. S.

650, 655; *Electric Bond & Share Co.* v. *Securities and Exchange Commission*, 303 U. S. 419. If oppressive child labor were employed at a generating plant from which electric power was transmitted to another State, no one would deny that the power company shipped in commerce "goods produced in an establishment in or about which" oppressive child labor had been employed. *Canfield* v. *West Texas Utilities Co.*, 44 F. Supp. 847 (N. D. Tex.); *Richardson* v. *Delaware Housing Assn.*, 6 Wage Hour Rept. 473 (S. D. Fla. 1943). The case stands the same where the electric impulses convey intelligence rather than energy; such impulses like all electric power are "goods."

Petitioner concedes (Br. p. 32) that its telegrams carried for its patrons and the electric impulses in which they are conveyed are "subjects" of interstate commerce in the normal sense of the word. In the court below, petitioner sought to limit the meaning of "subjects of commerce" in the Fair Labor Standards Act by arguing that the seven preceding words in the definition refer to tangible things and that, therefore, under the *eiusdem generis* rule "subjects" must also be read to refer only to tangible things. But whatever utility the *eiusdem generis* rule retains today (see *United States* v. *Gilliland*, 312 U. S. 86, 93; *Securities & Exchange Comm.*

v. *Joiner Corp.*, 320 U. S. 344, 350–351), it is inapplicable to the instant case. Congress defined "goods" to include "wares, products, commodities, merchandise, or articles or subjects of commerce of any character." The words "of any character" forbid the inference that all the things that are listed have some common characteristic; those words expressly state that regardless of *genus* all articles or subjects of commerce are to be regarded as "goods."

Petitioner has changed its ground. It now contends that what Congress had in mind in defining "goods" was "some *res*, tangible or intangible, which is produced, transported and sold to be consumed, in competition or potential competition with other sales of similar products" (Br. p. 33). As a matter of textual analysis there is no basis for this conclusion. And although one of the principal reasons for the passage of the Fair Labor Standards Act was the inability of the States to achieve fair labor standards within their own borders in the face of the depressing competition of cheap goods from States with lower standards, there is no reason to believe that Congress intended to regulate only those subjects of commerce which enter into commercial competition. The power under the commerce clause is far broader. Many subjects of commerce are non-commercial. *Caminetti* v. *United States*, 242 U. S. 470; *United States* v. *Hill*, 248 U. S. 420. See also

Lottery Case, 188 U. S. 321; *Hoke* v. *United States*, 227 U. S. 308; *United States* v. *Simpson*, 252 U. S. 465; *Brooks* v. *United States*, 267 U. S. 432; *United States* v. *South-Eastern Underwriters Assn.*, 64 S. Ct. 1162, 1172. The language of Section 3 (i) and its legislative history show, as we have pointed out above (pp. 11–12), that the Congress intended "goods" to include everything it had power to regulate as a subject of commerce. The lower courts have uniformly recognized that to limit the definition of "goods" to those which are sold in commercial competition would seriously restrict the coverage of the Act in a way in which Congress cannot have intended. *Walling* v. *Haile Gold Mines Inc.*, 136 F. (2d) 102 (C. C. A. 4); *Fox* v. *Summit King Mines*, 143 F. (2d) 926 (C. C. A. 9, 1944); *Fleming* v. *Atlantic Co.*, 40 F. Supp. 654 (N. D. Ga.), affirmed, 131 F. (2d) 518 (C. C. A. 5); *Hamlet Ice Co.* v. *Fleming*, 127 F. (2d) 165 (C. C. A. 4), certiorari denied, 317 U. S. 634; *Chapman* v. *Home Ice Co.*, 136 F. (2d) 353 (C. C. A. 6), certiorari denied, 320 U. S. 761.

There is, moreover, a second answer to petitioner's contention. It is a matter of common knowledge that petitioner does in fact carry reports, news and other intelligence which are subjects of trade and which compete with similar reports transported by other means of communication.

2. Petitioner "produces" goods within the meaning of Section 12 (a)

As the courts have repeatedly recognized,[1] the Act expands the term "produced" beyond its normal connotations; Section 3 (j) provides:

> "Produced" means produced, manufactured, mined, handled, or in any other manner worked on * * *.

There is no incongruity in speaking of a message as a thing "produced." Congress itself uses the word to cover intellectual productions in exempting from Section 12 "any child employed as an actor in * * * theatrical productions" (Section 13 (c)). But even if petitioner is not to be regarded as participating in the production of the ideas conveyed by telegram, certainly it not only "handles" but "works on" the message; its employees transform the spoken words of the sender, or his writing, into the regulated electric impulses which alone are transmitted across the State lines. Thus to convert a message into meaningful electric pulsations which

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[1] *Bracey* v. *Luray*, 138 F. (2d) (C. C. A. 4); *Fleming* v. *Kenton Loose Leaf Tobacco Warehouse Co.*, 41 F. Supp. 255 (E. D. Ky.); *Fleming* v. *Atlantic Co.*, 40 F. Supp. 654 (N. D. Ga.), affirmed, 131 F. (2d) 518 (C. C. A. 5). See also *Rahgo* v. *Cities Service Oil Co.*, 177 Misc. 1059, 33 N. Y. S. (2d) 42 (Munic. Ct. N. Y. City, 1942); *Campbell* v. *Mandel Auto Parts Corp.*, 31 N. Y. S. (2d) 656 (Sup. Ct. N. Y., N. Y. Co., 1941); *Gaskin* v. *Odell Coleman and Sons*, 5 Wage Hour Rept. 581, 584 (C. C. Ky. Mercer Co., 1942). Contra: *Walling* v. *James V. Reuter, Inc.*, 137 F. (2d) 315 (C. C. A. 5), judgment vacated 321 U. S. 671.

move in commerce is to "produce" a subject of commerce in the most literal sense. Indeed, what happens meets precisely even the interpretation that petitioner has placed on the definition of "produced." The function of the definition, petioner says (Br. p. 34), is to preclude one who processes goods manufactured by another from claiming that he is not a producer. Prior to its transmission petitioner "processes" the message—it converts the message into a wholly different form—and therefore petitioner is, although not the orignator, precluded by the definition from claiming that it is not a producer of goods.

The remainder of petitioner's argument on this point is devoted only to showing that "handling" by a carrier—mere transportation—does not constitute production (Br. p. 34). But if we assume this to be true, it does not help petitioner. For petitioner does not merely transport messages. As the court below pointed out (R. 36), "there is not the least similarity between what the defendant [petitioner] does and the transportation of goods by a common carrier." The message never leaves the originating office in the form in which it is received. It is changed into something wholly different; and the activities which bring about the conversion constitute working on the message whether the message be regarded as the intelligence or the media in which it is conveyed.

3. *Petitioner "ships" goods within the meaning of Section 12 (a)*

The verb "ship" is an imprecise word meaning little more than to send or to transport.[2] Originally it meant to put aboard a vessel, but plainly that is not the meaning here. Section 12 (a) provides that "no producer * * * shall ship or deliver for shipment * * *." Hence "ship" cannot be viewed as referring only to delivery to a carrier for transportation, as excluding transportation by the producer itself. This construction, for which petitioner seemingly contends (Br. p. 36), would subvert the Act by opening interstate commerce to the products of child labor provided only that the producer itself carries them across State lines.

The truth is, we submit, that "ship" is a word that normally takes its color from its context. Section 12 (a) was designed to exclude from the channels of interstate commerce every subject of commerce of any character worked on in an establishment in which child labor is employed. The definitions of "goods" and "produced" bear witness to this purpose. Since "ship" is not de-

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[2] Funk and Wagnalls' New Standard Dictionary defines the verb "ship" as meaning "to send by any established mode of transportation; as, to ship goods by rail or express." The definition given in Websters' New International Dictionary is "to put or receive on board of a ship, or other vessel, for transportation; to send by water; to cause to embark; to transport, or commit for transportation."

fined, it must be read in its general sense of "send" or "transport" in order to give effect to these definitions rather than in a restricted sense which would deprive "goods" and "produced" of the broad meanings which Congress has expressly given them. Petitioner "sends" the messages, and it does no violence to language to say, as this Court has said, that it "transports" them. *Western Union Tel. Co.* v. *Texas*, 105 U. S. 460, 464. Since the messages are "goods," there can be no doubt that petitioner "ships" them in commerce when its employees send them across State lines.

The difficulties which petitioner sees in our interpretation of Section 12 (a) are in some cases non-existent and in others merely the sanctions which the Congress deliberately adopted. For example, petitioner argues (Br. p. 43) that if messages are "goods," an employer of child labor cannot send telegrams or use the mails across State lines. Likewise, petitioner asserts that if we are right it cannot send "telegrams about its own business, ship its poles or office supplies, or use the mail" if it continues to employ children under 16 (*ibid*). We agree with both conclusions. The Congress deliberately closed the channels of interstate commerce to those employers who seek to profit by the exploitation of children. But we cannot accept petitioner's conclusion that Congress agreed with "the point of view of manage-

ment" that "fifteen is probably the optimum age for a messenger" because management requires boys who do "not expect immediate promotion" and are "available in the labor market at rates of pay generally less than the minimum of twenty-five cents an hour" (Br. p. 44). This was the social philosophy which Congress rejected. Such were the very evils which Congress intended to strike down. Petitioner's arguments illustrate the crying need for the prohibition which the courts below found in Section 12; they do not show that those courts were in error.

Petitioner argues (Br. p. 42) that telegrams cannot be goods because, if they were, petitioner would be required to refuse to transmit telegrams produced by the sender in an establishment in which oppressive child labor was employed.[1] But Section 15 (a) (1) provides—

> * * * no provisions of this Act shall impose any liability upon any common carrier for the transportation in commerce in the regular course of its business of any goods not produced by such common carrier, and no provision of this Act shall excuse any common carrier from its obligation to accept any goods for transportation.

Although petitioner now contends that this exemption does not ever apply to it (Br. p.

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[1] Or telegrams in the production of which the sender had violated the wage and hour provisions of the Act. See the first part of Section 15 (a) (1).

42), it made just the opposite contention in the circuit court of appeals, arguing that the exemption had the effect of rendering the Act wholly inapplicable to it. (See R. 35.) Both these contentions are unsound. The manifest purpose of the exemption is to protect from liability under the Act, notwithstanding its broad definition of "produced," persons subject to a common carrier's obligation to accept goods for transportation who transport goods which others have produced in establishments in which oppressive child labor was employed. In other words, a common carrier which does not itself employ oppressive child labor is not to be viewed as a producer of the goods it transports merely because in transporting those goods it necessarily "handles" or "works on" them; the meaning of the words "not produced by such common carrier" in this section must be read, in order to give the exemption meaning, as thus restricted by their context in spite of the express definition of "produced" in Section 3 (j). Petitioner, therefore, can with impunity, so long as it does not itself employ oppressive child labor, transmit telegrams for persons who do.[1] In the present case oppressive

[1]Although there may be a question as to whether petitioner is a "common carrier" engaged in "transportation" for some purposes (see Pet. Br. p. 36), clearly this proviso was intended to protect any enterprise which, pursuant to a legal obligation, carried the products of another who might not have complied with the law's standards.

child labor is employed, not by the sender of the telegram, but by petitioner itself. Hence the exemption, though available to petitioner, does not aid it here.

We submit, therefore, that as a matter of textual analysis, petitioner must be held to have violated the Act. We are not seeking to extend its coverage by implication. The express statutory definitions, read in their plain and ordinary meaning, compel the conclusion that petitioner, by working on messages in its public offices and then sending them across State lines, "ships" in commerce "goods" "produced" in establishments in which petitioner admittedly employs oppressive child labor. If this gives "goods" and "produced" meanings broader than their normal connotations, those connotations must yield to the statutory definitions. *Fox* v. *Standard Oil Co.*, 294 U. S. 87; *Emery Bird Thayer Dry Goods Co.* v. *Williams*, 98 F. (2d) 166 (C. C. A. 8).

B. THE LEGISLATIVE HISTORY OF THE ACT IS CONSISTENT WITH THE INTENTION, SHOWN BY THE WORDS, TO ELIMINATE OPPRESSIVE CHILD LABOR AT ESTABLISHMENTS SUCH AS PETITIONER'S

We have shown above that the present case is plainly covered by Section 12 (a) if the words of that section are given the meaning which Congress declared them to have. The courts may refuse to apply or may limit those definitions only if it can be demonstrated from other materials that the words do not faithfully reflect the Congressional

intention. In other words, the definitions supplied by Congress must control, even though they reach establishments customarily described as engaged in commerce, rather than in the production of goods for commerce, unless the legislative history of the Act shows affirmatively that, as petitioner contends, Congress intended that no child labor in commerce itself should be covered by the Act.

When the bill that became the Fair Labor Standards Act was introduced, there was general agreement that Congress should eliminate child labor wherever federal power would reach. The evil had long been recognized.* The need for fed-

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*The first minimum age law in this country was adopted by Pennsylvania in 1848. Session Laws 1848, P. L. 278. As industrialization expanded, awareness of the child labor problem grew. By the turn of the century, 24 States had enacted minimum age standards for various classes of activity. *History of Labor in the United States*, Commons and Associates, Vol. 3, p. 403, MacMillan Company, New York, 1935.

In 1906 the first bills were introduced to deal with child labor on a national scale. Ten years later Congress enacted the first Federal Child Labor Law, which extended only to factories, manufacturing establishments, canneries, workshops, mines and quarries. 39 Stat. 675, c. 432. This law was declared unconstitutional. *Hammer* v. *Dagenhart*, 247 U. S. 251. Congress immediately sought to regulate child labor by the use of its taxing power: 40 Stat. 1138, c. 18. This Act also was declared unconstitutional by the Supreme Court. *Bailey* v. *Drexel Furniture Co.*, 259 U. S. 20.

In 1924 Congress submitted to the States, for ratification, a proposed amendment to the Constitution, authorizing Congress "to limit, regulate, and prohibit the labor of persons under eighteen years of age." 43 Stat. 670. It has been

eral action was known. In his message to Congress, the President condemned without limitation the employment of children: "A self-supporting and self-respecting democracy can plead no justification for the existence of child labor * * *" (H. Doc. 255, 75th Cong., 1st sess., p. 2). In the hearings, the testimony developed a program of abolishing child labor and its products from the national sphere by statute and from the intrastate realm by pressing the proposed constitutional amendment. Joint Hearings before the Senate Committee on Education and Labor and the House Committee on Labor on S. 2475 and H. R. 7200, 75th Cong., 1st sess., pp. 390–391, 396–402. And on the floor, it was said without contradiction that the Act would eliminate child labor from industry. E. g., 83 Cong. Rec. 9263–9264.

Nothing in the legislative history suggests that the employment of children under 16 to deliver messages in any business was regarded as an exception to this general purpose. The reference

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ratified by 28 States. *Annual Report of the Secretary of Labor*, Fiscal Year Ended June 30, 1939, p. 159.

Under the National Industry Recovery Act, 576 codes were adopted, each of them containing minimum age provisions. After the N. R. A. was declared unconstitutional in *Schechter Poultry Corp.* v. *United States*, 295 U. S. 495, the number of children leaving school for work sharply increased. *Trend of Child Labor 1927–1936*, Monthly Labor Review, December 1937, p. 1375, published by the United States Department of Labor. Public concern over the child labor question was reflected during the 1937 session of Congress by the introduction of nearly 50 bills affecting child labor.

to messengers in Section 14 of the Act shows that Congress was aware that the Act would reach persons so employed; and it will not be denied that Congress intended the child labor provisions of the Act to apply to messengers working in or about manufacturing establishments which ship their goods in commerce.[6] The practice of employing children as messengers was equally open and notorious, and no less an evil, in the communications industry. The problem confronting both the President and Congress was not whether or how far child labor should be eliminated from industries subject to federal regulation; it was, how far does federal power reach and how can it be used most effectively to abolish the evil. Common sense alone repels the suggestion that Congress intended to eliminate the employment of children from establishments manufacturing goods for commerce—action then of doubtful constitutionality (*Hammer* v. *Dagenhart*, 247 U. S. 251)—and to leave unimpaired the equal evil of child labor in industrial activities which fall within the language of the Act but also constitute interstate commerce proper—activities peculiarly within the competence of Congress to regulate. Had this been the case, surely some statement to that effect would have been made either by an exception in

[6] See colloquy between Senator Johnson of Colorado and Senator Barkley. Hearings before the Senate Committee on Interstate Commerce, 75th Cong., 1st sess., on S. 592, S. 1976, S. 2068, S. 2226, and S. 2345, p. 128.

the Act, or in the hearings, or in the debates. But no such statement was made. The intention to cure the evil was general, and the Act should be construed to provide as broad a remedy as the words permit. Cf. *United States* v. *American Trucking Assns.*, 310 U. S. 534; *Missel* v. *Overnight Motor Co.*, 126 F. (2d) 98, 103 (C. C. A. 4), affirmed, 316 U. S. 572.

Petitioner finds evidence of an intention not to regulate the employment of child labor in its operations in the omission from Section 12 of any words prohibiting the employment of child labor "in commerce." It points to the contrast between Section 12 and Sections 6 and 7, the wage and hour provisions, which do expressly regulate both employment "in the production of goods for commerce" and employment "in commerce"; Congress, it is said "refused to declare any national policy with respect to child labor, to prohibit child labor in commerce, or to supersede state regulation with any uniform national rule" (Br. p. 7). Manifestly, this is an overstatement. Congress decided not directly to *prohibit* child labor at all, whether in commerce, in the production of goods for commerce, or in industries affecting commerce. Instead it decided to rely on an indirect sanction—to prohibit shipment in commerce of goods produced in establishments where child labor was employed. In Section 3 (l) Congress did declare a national policy of eliminating the employment of children under

16 years of age from all establishments sending their goods in interstate commerce. This uniform national rule was urged by the leading advocates of child labor legislation, and was adopted over the opposition of those who wished to leave the field wholly to diverse State regulations by enacting legislation which would do no more than subject interstate goods to the child labor laws of the State of destination.[7]

It is equally plain that Congress did not decide that no child labor in industries engaged in commerce itself should be covered by the Act. True, since Congress had determined not to prohibit child labor directly, it did not speak in section 12 of establishments engaged "in commerce," and accordingly that section does not apply to those establishments which, although they engage in commerce, do not "produce" and "ship" any "goods" within the meaning of the Act. But since the concept "in commerce," and the concept "in the production of goods for commerce" as defined by the Act, are not mutually exclusive, a single employee may be engaged in an activity which either phrase will properly describe. A

[7] Joint hearings before Senate Committee on Education and Labor and House Committee on Labor, 75th Cong., 1st sess., on S. 2475 and H. R. 7200: testimony of Mrs. Larue Brown, representing the National League of Women Voters, pp. 390–391; of Mr. Courtenay Dinwiddie, General Secretary, National Child Labor Committee, pp. 399–400; statement for the National Federation of Business and Professional Women's Clubs, Inc., by Mrs. Opal D. David, p. 395.

business activity carried on at one establishment may constitute both production for commerce and commerce itself. E. g. *Fleming* v. *Kirschbaum Co.*, 124 F. (2d) 567 (C. C. A. 3), affirmed, 316 U. S. 517. On petitioner's theory the job of shipping clerk or elevator operator, when both in commerce and producing for commerce within the statutory definitions, would be exempt from the child labor provisions because it falls in the two classes rather than in the latter alone. It cannot be supposed that Congress intended that a business covered by the words it did use should be viewed as outside the Act because that business would also have been covered by other words which Congress did not use as a result of its decision to rely upon an indirect sanction rather than a direct prohibition.

The legislative history of the Act contains no evidence of Congressional intent warranting a restriction of Sections 3 (i) and 3 (j) as applied to the child labor provisions. The original Black-Connery bill (Sections 7 (c) and 2 (a) (18)) and the bill reported by the Senate Committee on Education and Labor (Sections 7 (2) and 2 (a) (11)) prohibited the employment of child labor in interstate commerce or in the production of goods intended for shipment in interstate commerce. On the floor of the Senate, however, a change was made. The Senate struck out all the provisions of the Committee bill dealing with child labor and

substituted the provisions of the Wheeler-Johnson bill (S. 2226, 75th Cong., 1st sess.) previously reported (S. Rept. 726, 75th Cong. 1st sess.) by the Committee on Interstate Commerce. See 81 Cong. Rec. 7949–7951. This substitute section contained four regulations: (1) it subjected the products of child labor to the laws of any State into which they might be shipped; (2) it forbade the transportation in interstate commerce of the products of child labor intended to be sold in violation of the laws of any State; (3) it required that all products of child labor shipped in interstate commerce bear a label showing the kind of work in which the children were employed; and (4) it prohibited the transportation in interstate commerce of "goods, wares or merchandise" produced "wholly or in part through the use of child labor." It was the first three provisions that were regarded as the heart of this proposal. The Senate adopted them on the constitutional theory that even if Congress could not set its own standards for child labor—could not validly enact the fourth provision—it did have power under the constitution to supplement State laws by prohibiting interstate sales of goods made by children under conditions outlawed by the State of destination.[8] (See 81 Cong. Rec. 7663–7667.)

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[8] See *Kentucky Whip & Collar Co.* v. *Illinois C. R. R. Co.*, 299 U. S. 334; *Whitfield* v. *Ohio*, 297 U. S. 431.

The bill as passed by the House on May 24, 1938 proceeded on the simple, straightforward theory that the Congress should squarely challenge the old decision in *Hammer* v. *Dagenhart*, 247 U. S. 251, by prohibiting the shipment of goods from establishments in or about which child labor was employed and should also go further and directly prohibit the employment of children by any employer engaged "in commerce in any industry affecting commerce."[9] Section 10 provided:

> SEC. 10. (a) No producer, manufacturer, or dealer shall ship or deliver for shipment in commerce any goods produced in an establishment situated in the United States in or about which within thirty days prior to the removal of the goods therefrom any oppressive child labor has been employed * * *.
>
> (b) No employer engaged in commerce in any industry affecting commerce shall employ any employee under any oppressive child labor condition.

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[9] This phrase was intended to cover both employers engaged in commerce and employers engaged in an industry affecting commerce. Section 3 of the House bill defined separately "employer engaged in commerce" and "industry affecting commerce," as follows:

"(j) 'Industry affecting commerce' means an industry with respect to which an order issued under section 6 is in effect.

"(k) 'Employer engaged in commerce' means an employer in commerce, or an employer engaged, in the ordinary course of business, in purchasing or selling goods in commerce." (See S. 2475, 75th Cong., 3rd sess., print of April 20, 1938, p. 50.)

The first issue before the Conference Committee affecting the child labor provisions was whether to accept the theory of supplementing State laws upon which the Senate bill was primarily based or the national standard theory of the House. The House bill was made the basis for the conference report (H. Rept. 2738, 75th Cong., 3d sess., p. 32). Accordingly, there is no merit in petitioner's argument that Congress did not establish any national policy concerning child labor.

The second issue before the Conference Committee affecting the child labor provisions was common to the entire bill. The theory of the House bill, running through the wage, the hour and the child labor provisions equally, was that the legislation should apply to employment "in commerce in any industry affecting commerce" [10] with the Secretary of Labor empowered to determine in accordance with criteria supplied by Section 6 whether an industry was one "affecting commerce." The Conference Committee, however, decided to eliminate the broad delegation of administrative discretion to determine what industries affect commerce. A corresponding change was made in the wage and hour provisions, which became Sections 6 and 7; they were confined to employment "in commerce" and "in the production of goods for commerce." The Conference Committee then struck out Subsection 10 (b)

[10] See n. 9, supra, p. 30.

quoted above; it explained that it did this for the same reason that impelled it to change the wage and hour provisions. The Conference Report states (H. Rept. 2738, 75th Cong., 3d sess., p. 32):

> Section 12 of the conference agreement adopts the child labor provisions of the House amendment, with one exception. In view of the omission from the conference agreement of the principle of section 6 of the House amendment [the delegation of authority to the Secretary to determine what industries affect commerce], subsection (b) of section 10 of the House amendment has been omitted.

Thus the deletion of Section 10 (b) was the result of the intention to eliminate from the entire bill administrative discretion to determine what industries affect commerce.

The Conference Committee did not, however, when it eliminated Section 10 (b), substitute for it provisions forbidding the employment of children in commerce and in the production of goods for commerce. No explanation of its decision to rely wholly upon the indirect sanction of a prohibition of shipment in commerce is given in the Conference Report or anywhere else. Petitioner views this decision as indicative of an intent that the child labor provisions in their present form should not apply to a business engaged in commerce even though it also ships in commerce goods produced in an establishment employing child labor. But the same reasoning would require the absurd con-

clusion that the present child labor provisions are inapplicable also to any business which "affects commerce." The prohibition which the Conference Committee eliminated applied not only to employment in commerce but also to employment in "any industry affecting commerce." Petitioner ignores this fact and in its brief (pp. 16 ff.) repeatedly refers to Section 10 (b) as "the prohibition of child labor in commerce."

Petitioner suggests four reasons why Congress, and the Senate in particular, refused to enact a "prohibition of child labor in commerce" (Br. pp. 16 ff.). If the direct prohibition of child labor in Section 10 (b) had been limited to employers engaged in interstate commerce, no one of these reasons would explain why it was not enacted into law. And certainly they do not support petitioner's argument that the deletion of this Section manifested a purpose to exclude from the child labor provisions employers engaged in commerce, because they were so engaged, notwithstanding the fact that their activities would otherwise be reached by Section 12. Actually all four reasons are patently untenable.

The first is that Congress doubted its constitutional power. It is impossible to believe that Congress, although it was willing to assert control of the interstate carriage of goods made by child labor establishments—an act of doubtful constitutionality—shrank nevertheless as a result of constitutional scruples from asserting its plain

power to control the employment of child labor in interstate commerce. Petitioner's second and third reasons are that Congress refused to regulate child labor in interstate commerce in order to avoid interference with state authority and to encourage ratification of the child labor amendment. But the present Act in effect imposes a uniform sixteen-year minimum-age requirement on the employment of children in establishments producing goods for interstate commerce. Surely in the face of these provisions it cannot be said that the factors mentioned would have caused Congress deliberately to exclude child labor *in* interstate commerce. Petitioner's fourth explanation is that there was no reason to prohibit the employment of children in interstate commerce. But despite the writings of Horatio Alger, Jr., to which petitioner refers (Br. p. 21), it seems quite plain that Congress did not regard the employment of children as messengers as an unmixed blessing. See pp. 24–25, *supra*.

There is a more reasonable explanation for the failure of Congress to make the same change in the child labor provisions that it made in the wage and hour provisions. The leading adherents of the child labor provisions were insistent that coverage should depend on the interstate character of the establishment rather than on the nature of the employment of each partic-

ular child."[11] The Conference Committee accepted this view. The test of coverage in the wage and hour provisions—any employee engaged in commerce or in the production of goods for commerce—therefore could not be used because it was too narrow. And the failure to insert a provision directly prohibiting child labor in or about either establishments carrying on interstate commerce or establishments producing goods for commerce may well have been due to doubt whether Congress could constitutionally forbid the employment by such establishments of children who did not themselves engage in commerce or in the production of goods for commerce. It is also possible that the omission resulted from the realization that the indirect sanction of forbidding interstate shipment coupled with the broad statutory definitions of "goods" and "produced" and the "in or about" an establishment test would effectively eliminate child labor from commerce itself and from the production of goods for commerce in all important cases.

Whatever the explanation of the absence from the Act of a direct prohibition of child labor—

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[11] Hearings before the Committee on Interstate Commerce, U. S. Senate, 75th Cong., 1st sess., on S. 592, S. 1976, S. 2068, S. 2226, and S. 2345, May 12, 18, 20, 1937, comment of Senator Barkley, p. 128; testimony of Mr. Courtenay Dinwiddie, General Secretary, National Child Labor Committee, pp. 98–99.

even if it resulted from inadvertence—the legislative history as a whole makes it clear that the omission was not the result of a deliberate purpose to leave unaffected employment of child labor in interstate commerce under such circumstances that the tests of coverage set forth in the Act are satisfied. If any inference is to be drawn from the legislative history, it is that Congress believed the scope of Section 12 (a) to be as broad as the coverage of the wage and hour provisions. No purpose was to be served by making it narrower. An important social purpose would be partly defeated by cutting it down. While this is no ground for expanding Section 12 to cover interstate activities not comprehended by the language employed by Congress, it does require that the statutory definitions of "produced" and "goods" be given their full scope in order to gain the end which Congress believed it had achieved. To apply Section 12 to petitioner is not to extend the Act by implication; it is to give the definitions the natural and established meaning of their words and to carry out the intention of the Congress.

We think it clear that the legislative history clearly does not support the inferences petitioner seeks to draw from it. Since the Act literally read reaches petitioner, the burden is on it to show that the legislative history requires a departure from the literal meaning. If the Court should decide that the legislative material is inconclusive in either direction, the language of the

Act, read in the light of the general legislative purpose, should prevail. Both language and purpose demonstrate that activities within the broad statutory definitions should be subjected to the child labor provisions even though the employer be in interstate commerce.[12]

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[12] In its petition for certiorari, petitioner dwelt at some length on the form of the district court's decree. The decree (R. 31) restrains it from—

"Transmitting in interstate commerce * * * telegraph or other messages or any other goods produced by or for defendant * * * in any establishment * * * in or about which within thirty (30) days prior to the transmission or other removal of such messages or other goods therefrom, there shall have been employed * * * any oppressive child labor * * *."

Petitioner states that this is an "injunction which neither the plaintiff nor the court could possibly permit to be obeyed" (Pet. 7, cf. Pet. 3). Except for the initial 30-day period, compliance with the injunction will require petitioner to do nothing except cease the oppressive employment of children whom Congress has declared too young to work (section 3 (l)). In the future, petitioner may protect itself against any unwitting violations of the Act or the decree by requiring all minors to present certificates of age. (Section 3 (l)). It may even be that the 30-day period will present no problem, for some time will elapse before the mandate goes down, in which petitioner may discharge all under-age children in its employ, and the 30-day period may then elapse before the decree becomes effective. But if the period intervening before the decree becomes effective is not long enough to enable petitioner to make a reasonable adjustment of its employment practices and continue the shipment of messages, then either the circuit court of appeals or the district court may properly stay the injunction further in order to permit the transmission of messages until petitioner has a reasonable time to comply. See *Standard Oil Co. of New Jersey* v. *United States*, 221 U. S. 1, 81; *United States* v. *American Tobacco Co.*, 221 U. S. 106, 187–188.

CONCLUSION

The judgment of the circuit court of appeals should be affirmed.

Respectfully submitted.

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OCTOBER 1944.

U. S. GOVERNMENT PRINTING OFFICE : 1944

SUPREME COURT OF THE UNITED STATES.

No. 49.—October Term, 1944.

The Western Union Telegraph Company, Petitioner, *vs.* Katharine F. Lenroot, Chief of the Children's Bureau, United States Department of Labor.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[January 8, 1945.]

Mr. Justice Jackson delivered the opinion of the Court.

A decree of the District Court in substance restrains the Western Union Telegraph Company from transmitting messages in interstate commerce until for thirty days it has ceased employment of messengers under the age of sixteen years and of certain others between the ages of sixteen and eighteen. This was thought to be required by the Fair Labor Standards Act of 1938. The Circuit Court of Appeals affirmed, and we granted certiorari. — U. S. —.

The Western Union Telegraph Company collects messages in communities of origin and dispatches them by electrical impulses to places of destination where they are distributed. Messengers are employed in both collection and distribution. A little under 12 per cent of the messenger force is under sixteen years of age, and about .0033 per cent are from sixteen to eighteen years of age, engaged in the operation of motor vehicles, scooters, and telemotors. These messengers are employed only in localities where the law of the state permits it. It is not denied that both groups are engaged in oppressive child labor as defined by the Federal Act,[1] if it applies. Whether it does so apply is the only

, or (2) any employee between the ages of sixteen and eighteen years is employed by an employer in any occupation which the Chief of the Children's Bureau in the Department of Labor shall find and by order declare to be particularly hazardous for the employment of children between such ages or detrimental to their health or well-being ...."

[1] [illegible] a child to [illegible] the age of sixteen years in an occupation other than manufacturing or mining) in any occupation [illegible] 29 U. S. C. § 203 (), June 25, 1938, c. 676, § 3 (), 52 Stat. 1061.

against employment of child labor in conducting interstate commerce.[2] It is conceded, too, that language appropriate directly to forbid this employment was proposed to Congress and twice rejected.

The major events of the recorded legislative history of this Act so far as relevant were as follows: After the President's labor message of May 24, 1937 (House Doc. No. 255, 75th Cong., 1st Sess., p. 2) reminded Congress that "A self-respecting and self-supporting democracy can plead no justification for the existence of child labor," bills carefully drawn to carry out his recommendations were introduced in the Senate by Senator Black and in the House by Representative Connery. These bills expressly and comprehensively prohibited the employment of child labor either in interstate commerce or in production of goods intended for shipment in interstate commerce, as well as prohibiting shipment of goods made by child labor.[3] When the Black bill came to vote in the Senate, however, all of its child-labor provisions were stricken, and the provisions of another bill recommended by the Committee on Interstate Commerce were substituted.[4] This prohibited the shipment in interstate commerce of goods made by child labor, but it did not prohibit the use of it in carrying on the commerce itself. Thus the Senate deleted a direct prohibition of the employment under question here. But

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[2] The Act provides: "After the expiration of one hundred and twenty days from the date of enactment of this Act, no producer, manufacturer, or dealer shall ship or deliver for shipment in commerce any goods produced in an establishment situated in the United States in or about which within thirty days prior to the removal of such goods therefrom any oppressive child labor has been employed . . . ." § 12(a), 29 U. S. C. § 212(a).

[3] "Sec. 7. It shall be unlawful for any person, directly or indirectly—

(1) to transport or cause to be transported in interstate commerce, or to aid or assist in transporting, or obtaining transportation in interstate commerce for, or to ship or deliver or sell in interstate commerce, or to ship or deliver or sell with knowledge that shipment or delivery or sale thereof in interstate commerce is intended, any unfair goods; or

(2) to employ under any substandard labor conditions any employee engaged in interstate commerce or in the production of goods intended for transportation or sale in violation of clause (1) of this section." This was the provision in the bill S. 2475 as reported, respectively, by the Senate Committee on Education and Labor, July 6, 1937, and by the House Committee on Labor, August 6, 1937. "Unfair goods" was defined to mean goods produced by any substandard labor condition, and the latter was defined to include child labor. §§ 2(a)(11) and (15).

[4] This was S. 2226, reported in Sen. Rep. No. 726, 75th Cong., 1st Sess. It was incorporated into the Black bill July 31, 1937, 81 Cong. Rec. 7949-51. It provided: "Sec. 4 [§ 27 in the amended Black bill]. It shall be unlawful for any person who—

the House, in turn, struck out all of the child labor provisions of the Senate bill and substituted those of the Connery bill,[5] which was a counterpart of the Black bill. This was much amended, but as passed at length it contained a provision forbidding child labor in interstate commerce "in any industry affecting commerce" and a prohibition of shipment of child-labor-made goods.[6] The Senate, however, did not agree to the House bill, but meanwhile had passed as a separate measure its own child-labor bill as recommended by the Interstate Commerce Committee.[7] This did not prohibit child labor in interstate commerce. In this posture the Fair Labor Standards bill went to conference. The Conference Report says that the Committee "adopts the child labor provisions of the House amendment, with one exception. In view of the omission from the conference agreement of the principle of section 6 of the House amendment, subsection (b) of section 10 of the House amendment has been omitted."[8] The formula covering every employer "in commerce in an industry affecting commerce" had been employed in the wage and hour

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(a) has produced goods, wares, or merchandise in any State or Territory, wholly or in part through the use of child labor, on or after January 1, 1938; or

(b) has taken delivery of such goods, wares, or merchandise in any State or Territory with notice of their character whether by purchase or on consignment, as commission merchant, agent for forwarding or other purposes, or otherwise,

to transport or cause to be transported, in any manner or by any means whatsoever, or aid or assist in obtaining transportation for or in transporting such goods, wares, or merchandise in interstate or foreign commerce or to sell such goods, wares, or merchandise for shipment in interstate or foreign commerce or with knowledge that shipment thereof in interstate or foreign commerce is intended." Other provisions subjected child-labor-made goods to the laws of the states into which they were shipped regardless of their interstate character, forbade transportation into states in violation of their laws, and forbade shipment in interstate commerce of goods not labelled as to their child-labor character. The bill represented the view that several methods of circumventing Hammer *v.* Dagenhart should be tried at the same time, in case any should be held invalid.

[5] See S. 2475 as reported by House Committee on Labor, August 6, 1937, H. R. Rep. 1452, 75th Cong., 1st Sess.

[6] "Sec. 10. (a). No producer, manufacturer, or dealer shall ship or deliver for shipment in commerce any goods produced in an establishment situated in the United States in or about which within 30 days prior to the removal of such goods therefrom any oppressive child labor has been employed . . . .

"(b) No employer engaged in commerce in any industry affecting commerce shall employ any employee under any oppressive child-labor condition." 83 Cong. Rec. 7441; passed, *id.* at 7450 (75th Cong., 3d Sess.).

[7] S. 2226, identical with the child-labor provisions previously incorporated by the Senate in the Black bill in lieu of the latter's child-labor provisions. See note 4, *supra*. 81 Cong. Rec. 9320.

[8] Conference Report, H. R. Rep. No. 2738, 75th Cong., 3d Sess., 32.

as well as the child-labor provisions of the House bill, and § 6 conferred on the Secretary of Labor the power to decide whether an industry was one "affecting commerce." With the elimination of this delegation to the Secretary, the formula was changed in the wage and hour provisions, making them apply to "every employee engaged in commerce or in the production of goods for commerce." Instead of making a corresponding change in the child-labor section, the conference committee dropped the whole clause. No reason for this different treatment of the child-labor section was given.

No controversy appears to have arisen on the floor of Congress as to inclusion of a direct prohibition applicable to interstate commerce. On the contrary, the advocates of the different versions passed by the Senate and House seem to have overlooked the fact that one contained the prohibition and the other did not; controversy was chiefly over whether the Act should simply re-enact the method of the 1916 Act, which had been held unconstitutional, or should hedge by including labelling and other remedies which might have a better chance of being upheld, whether state-issued age certificates should be utilized, how much discretion should be vested in the Department of Labor, and whether particular goods only or all goods from a particular establishment should be excluded from commerce.[9] So far as coverage was concerned, all proponents were aware that any of the suggested versions of legislation would reach only a small fraction of existing child labor.[10]

[9] See 82 Cong. Rec. 1411-14, 1597-98, 1691-95, 1780-83, 1822; 83 Cong. Rec. 7399-7400.

[10] See, *e. g.*, Joint Hearings on Fair Labor Standards, Senate Committee on Labor and House Committee on Education and Labor, 75th Cong., 1st Sess., 382-84; Hearings on Regulation of Child Labor, Senate Committee on Interstate Commerce, 75th Cong., 1st Sess., 60; remarks of Representative Schneider of the House Committee on Education and Labor, 82 Cong. Rec. 1823, 83 Cong. Rec. 7401. The Chief of the Children's Bureau of the Department of Labor presented to the Senate Interstate Commerce Committee figures, based on the 1930 Census, showing the distribution by occupations of child workers between 10 and 15 years:

Occupation	*Number*	*Per cent*
Agriculture	469,497	70.4
Manufacturing and mechanical industries	68,266	10.2
Trade	49,615	7.4
Domestic and personal service	46,145	7.0
Clerical occupations	16,803	2.5
Transportation	8,717	1.3
Extraction of minerals	1,184	0.2
Other (includes public and professional service, forestry, and fishing)	6,891	1.0

Hearings, *supra*, p. 60.

and the chief concern seems to have been to eliminate child labor in mining and manufacturing industries shipping goods in interstate commerce,[11] which was the most objectionable use of child

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Comparable figures based on the 1940 Census (but for the age group 14-17) are as follows:

Occupation	*Number*	*Per cent*
Agriculture, forestry, fishing	459,966	54.3
Mining	2,769	0.3
Construction	10,476	1.2
Manufacturing	**104,023**	**12.3**
Transportation, communication, and other public utilities	12,103	1.4
Trade	109,687	13.0
Personal services	109,628	13.0
Amusement, recreation, and related services	13,013	1.6
Professional and related services	12,128	1.4
Other	12,944	1.5

Pamphlet, *1940 Census Data on Employment and School Attendance of Minors 14 through 17 Years of Age* (Dept. of Labor, Children's Bureau, 1943) 14.

Since agriculture was expressly excluded (and this was true of all versions of child-labor legislation reported to the House and Senate), the child labor clearly covered by the "producing goods for commerce" formula was at most 12-15%, and most of the remainder was in occupations clearly not covered by that formula, such as local retailing and service industries. In this light, the omission of the one or two percent in nonproducing interstate commerce industries, even if deliberate, would not have been incongruous.

The following exchange during the Senate Interstate Commerce Committee hearings is also of interest, in view of the Senate's rejection of the Black-Connery child-labor provisions in favor of the Commerce Committee proposal:

"Miss LENROOT. . . . There has been a decided shift in the employment of children between the ages of 14 and 16 years from factories to miscellaneous occupations in trade and service industries, which would not be covered by any of the bills now pending before this committee, and which involve very often employment of children for long hours at very low wages.

The CHAIRMAN. Let me ask you this question right there: Do you think newsboys should be prohibited from working? I propound that question to you because it has been put up to me.

Miss LENROOT. I think under any powers that I can see that Congress has or that it may be construed to have now, it would be very difficult if not impossible to bring newsboys in.

The CHAIRMAN. But do you think they should be prohibited from such employment?

Miss LENROOT. I think if Congress had broad power to legislate on the subject of child labor it would be desirable to work out some standard which would be somewhat different from factory employment.

Senator MINTON. In other words, you think it is improper to use newsboys on the streets to sell newspapers?

Miss LENROOT. Under a certain age, and under certain conditions; yes. I would make the age somewhat lower than the age for factory employment, however."

Hearings, *supra*, p. 43.

[11] Thus Senator Wheeler, one of the authors of the measure adopted by the Senate, said, "We are trying to give you something of a practical nature that can be passed, that will perhaps not go as far as some of us would like to see it go, but something which we can uphold as constitutional, that will affect child labor, stop it, and prevent it effectively in the factories,

labor.[12] This had been the only object of the earlier legislation which had been held unconstitutional; neither the Act of 1916,[13] held unconstitutional in *Hammer* v. *Dagenhart*, 247 U. S. 251, nor the Act of 1919,[14] held unconstitutional in *Bailey* v. *Drexel Furniture Co.*, 259 U. S. 20, had prohibited child labor in interstate commerce, but both applied only to child labor in mines, quarries, mills, canneries, workshops, factories, and manufacturing establishments.

Both parties contend on the basis of legislative history that the omission of a direct prohibition was deliberate; the Company arguing that it was unwanted, the Government that it was believed superfluous. We think that dispassionate reading will not disclose what either advocate sees in this history.

It is nowhere stated that Congress did, and no reason is stated or is obvious why Congress should, purposely leave untouched child labor employed directly in interstate commerce. It is true that no opponent of child labor appeared to want to strike at all of it. Agriculture, which accounts for from one-half to two-thirds of it, was expressly exempted. Child actors, almost negligible in number, were exempted. Telegraph messengers, so far as the evidence reveals, although a familiar form of child labor, were in no one's mind in connection with this prohibition, although the peculiarities of that service were recognized in allowing them under certain conditions to be employed at lower than

particularly in the sweatshops and southern textile mills." "We want to keep them out of the factories where they are being exploited and are in competition with men and in competition with women who need work." Joint Hearings, *supra* note 10, pp. 33-34, 36. Representative Schneider, who was apparently in charge of the child-labor provisions of the Labor Committee's bill on the floor, reminded the members that although the bill went as far as it could, "the child labor that is used *in the production of articles for interstate commerce* constitutes only 25 percent of nonagricultural child labor that exists today," and hence ratification of the child-labor amendment was still essential. 82 Cong. Rec. 1823 (ital. supplied). And Senator Thomas, who was one of the Senate managers in the conference which produced the final bill, interpreted the result of the compromise as follows in his report to the Senate: "Neither House nor Senate yielded its convictions, but both Houses obtained their common objective, which was to abolish traffic in interstate commerce in the products of child labor and in the products of underpaid and overworked labor." 83 Cong. Rec. 9163.

[12] See generally the hearings preceding the enactment of the Child Labor Act of 1916, Hearings on H. R. 8234, House Committee on Labor, 64th Cong., 1st Sess.; Hearings on H. R. 8234, Senate Committee on Interstate Commerce, 64th Cong., 1st Sess.

[13] Act of Sept. 1, 1916, c. 432, § 1, 39 Stat. 675.

[14] Act of Feb. 24, 1919, c. 18, § 1200, 40 Stat. 1057, 1138.

minimum wages under the Act.[15] But whether a majority of Congress, had this question come to its attention, would have regarded messenger service as more like agriculture in being a relatively inoffensive type of child labor or as more like mining and manufacturing, considered more harmful, is a question on which we have no information whatever.

On the other hand, we find nothing to sustain the Government's position that "the omission resulted from the realization that the indirect sanction of forbidding interstate shipment, coupled with broad statutory definitions" would be construed to eliminate child labor from interstate commerce. No such realization appears in any committee report, in the speech of any sponsor of the bills, nor in debate either on the part of those supporting or of those opposing the bills. The only explanation advanced for the hypothesis that Congress deliberately chose indirection instead of forthright prohibition is an assumption that there were doubts of its constitutional power to enact direct legislation. It is true that in *Hammer* v. *Dagenhart*, 247 U. S. 251, this Court had held that an earlier attempt to exclude from interstate commerce products of mines and mills that employed child labor was an invalid attempt to reach employment matters within the control of the states. But even the prevailing opinion in that case expressly conceded that Congress had ample power to control the means by which interstate commerce is carried on. 247 U. S. at 272. There was never a holding or an intimation in this or any other decision of this Court that a direct prohibition of child labor in interstate commerce would not be sustained. Restrictive interpretation in this field reached its maximum in *Hammer* v. *Dagenhart*. It was decided by a closely divided Court and at the time this bill was pending it was undermined by later decisions and was thought to be marked, even then, for consignment to the limbo of overruled cases, a prediction that was shortly fulfilled. *United States* v. *Darby*, 312 U. S. 100. Moreover, the purpose of the proponents of this Act to challenge the decision in *Hammer* v. *Dagenhart* and require this Court to re-examine its soundness is manifest in many ways. It can hardly be supposed that Con-

[15] "The Administrator, . . . shall by regulations or by orders provide for (1) the employment of learners, of apprentices, and of messengers employed exclusively in delivering letters and messages, . . . at such wages lower than the minimum wage applicable under section 6 and subject to such limitations as to time, number, proportion, and length of service as the Administrator shall prescribe . . . ." § 14, 29 U. S. C. § 214.

gress, while reasserting a power once denied to it, feared to exercise directly a power often conceded and never denied.

Our search of legislative history yields nothing to support the Company's contention that Congress did not want to reach such child labor as we have here. And it yields no more to support the Government's contention that Congress wanted to forego direct prohibition in favor of indirect sanctions. Indeed, we are unable to say that elimination of the direct prohibitions from the final form of the bill was purposeful at all or that it did not happen from sheer inadvertence, due to concentration on more vital and controversial aspects of the legislation. The most that we can make of it is that no definite policy either way appears in reference to such an employment as we have in this case, no legislative intent is manifest as to the facts of this case which we should strain to effectuate by interpretation. Of course, if by fair construction the indirect sanctions of the Act apply to this employment, courts may not refuse to enforce them merely because we cannot understand why a simpler and more direct method was not used. But we take the Act as Congress gave it to us, without attempting to conform it to any notions of what Congress would have done if the circumstances of this case had been put before it.

II.

The Government brought this action to reach indirectly child labor in interstate commerce by bringing it under the prohibition of Section 12(a) of the Act, which so far as material reads "no producer, manufacturer, or dealer shall ship or deliver for shipment in commerce any goods produced in an establishment situated in the United States in or about which within thirty days prior to the removal of such goods therefrom any oppressive child labor has been employed." Violation of this command is a crime (§§ 15 and 16) punishable by a fine and imprisonment, and threatened violations may be restrained by injunction. The Government in this case sought injunction. Its complaint charges the Western Union with a violation in that "defendant has been engaged in shipping telegraph messages in interstate commerce and in delivering telegraph messages for shipment in interstate commerce, the said goods having been produced in its said establishments in or about which the aforesaid minors were employed, suffered, and permitted to work within thirty (30) days prior to the removal of said goods therefrom."

Contention that this section is applicable to the Western Union is predicated on three steps, viz.: telegrams are "goods" within its meaning; the Company "produces" these goods within the Act because it "handles" them; and transmission is "shipment" within its terms. If it can maintain all three of these positions, the Government is entitled to an injunction; if it fails in any one, admittedly the effort to bring the employment under the Act must fail.

The Government says messages are "goods" because the Act defines "goods" as therein used to include among other things "articles or subjects of commerce of any character." § 3(i). Of course, statutory definitions of terms used therein prevail over colloquial meanings. *Fox* v. *Standard Oil Co.*, 294 U. S. 87, 95. It was long ago settled that telegraph lines when extending through different states are instruments of commerce and messages passing over them are a part of commerce itself. *Western Union Telegraph Co.* v. *James*, 162 U. S. 650, 654. That "ideas, wishes, orders, and intelligence" are "subjects" of the interstate commerce in which telegraph companies engage has also been held. *Western Union Tel. Co.* v. *Pendleton*, 122 U. S. 347, 356; cf. *Associated Press* v. *National Labor Relations Board*, 301 U. S. 103, 128. It is unnecessary to decide whether electric impulses into which the words of the message are transformed are "goods" within the Act (cf. *Utah Power & Light Co.* v. *Pfost*, 286 U. S. 165; *Fisher's Blend Station, Inc.* v. *State Tax Commission*, 297 U. S. 650; *Electric Bond & Share Co.* v. *Securities & Exchange Comm.*, 303 U. S. 419), since the complaint is not based on "shipment" of impulses as "goods" but only of messages. We think telegraphic messages are clearly "subjects of commerce" and hence that they are "goods" under this Act, as alleged in the complaint.

The next inquiry is whether the Western Union Telegraph Company is a producer of these goods within the Act. Congress has laid down a definition that as used in the Act "'produced' means produced, manufactured, mined, handled, or in any other manner worked on . . . ." § 3(j). The Company, says the Government, not only "handles" the message but "works on" it.

The Government contends that in defining "produced" the statute intends "handled" or "worked on" to mean not only handling or working on in relation to producing or making an

article ready to enter interstate transit, but also includes the handling or working on which accomplishes the interstate transit or movement in commerce itself. If this construction is adopted, every transporter, transmitter, or mover in interstate commerce is a "producer" of any goods he carries. But the statute, while defining "produced" to mean "handled" or "worked on" has not defined "handled" or "worked on." These are terms of ordinary speech and mean what they mean in ordinary intercourse in this context. They serve a useful purpose when read to relate to all steps, whether manufacture or not, which lead to readiness for putting goods into the stream of commerce. One who packages a product, or bottles a liquid, or labels, or performs any number of tasks incidental to preparing for shipment might otherwise escape the Act, for in a sense he neither manufactures, produces, or mines the goods. We are clear that "handled" or "worked on" includes every kind of incidental operation preparatory to putting goods into the stream of commerce.

If we go beyond this and assume that handling for transit purposes is handling in production, we encounter results which we think Congress could not have intended. The definitions of this Act apply to the wage and hour provisions, as well as to the child labor provisions. Section 15(a) makes it unlawful to transport or ship goods in the production of which any employee was employed in violation of the wage and hour provisions. But it makes this exception: "except that no provision of this Act shall impose any liability upon any common carrier for the transportation in commerce in the regular course of its business of any goods *not produced by such common carrier.*" (Italics supplied.) This recognizes a distinction between handling in transportation and producing, which is entirely put to naught by the Government's contention that by definition everyone who handles goods in carriage is thereby made a producer. The exception then is as if it read "the Act shall impose no liability on a common carrier for carrying goods that it does not carry." One would not readily impute such an absurdity to Congress; nor can we assume, contrary to the statute, that "produced" means one thing in one section and something else in another. To construe those words to mean that handling in carriage or transmission in commerce makes one a producer makes one of these results inevitable. Congress, we think, did not intend to obliterate all dis-

tinction between production and transportation. Its artificial definition, if construed to mean that "handling" and "worked on" catches up into the category of production every step in putting the subject of commerce in a state to enter commerce, is a sensible and useful one, not at odds with any other section of the Act. We think the Government has not established its contention that the Western Union is a "producer" of telegraph messages.

A third inquiry remains. Has the Company engaged in "shipping telegraph messages in interstate commerce and in delivering telegraph messages for shipment" as alleged? The learned trial court said, "More troublesome is the question whether the defendant 'shipped' goods in commerce." But he concluded on the basis of our decisions that the defendant was a "carrier of messages" to be compared to a railroad as a "carrier of goods," citing *Telegraph Co.* v. *Texas*, 105 U. S. 460, 464, *Pensacola Telegraph Co.* v. *Western Union Telegraph Co.*, 96 U. S. 1. He thought "ship" synonymous with "transport" and "convey" and hence held that the Company was "shipping" messages.

The Circuit Court of Appeals, although it sustained the injunction, took a contrary view of the nature of the enterprise. It analyzed the technology of transmitting messages. The message, it said, never leaves the originating office. It is only a text for sending electrical impulses "which are not only not the sender's message, but would be totally incomprehensible to him or to the addressee, if either could perceive them." It said, "From the foregoing it is at once apparent that there is not the least similarity between what the defendant does and the transportation of goods by a common carrier." Thus it cut the ground from under the Government's only allegation of violation: i. e., that the Company is engaged in "shipping" messages. It advanced this theory, apparently, to answer the Company's contention that if it was likened to a carrier, as the District Court thought, it was entitled to the benefit of the carrier's exemption in Section 15(a)(1). We do not think it is necessary for us to resolve the interesting but baffling inquiry as to precisely what, if anything, moves across state lines in the telegraphic process. In its practical aspects, which concern the public, transmission of messages is too well known to require analysis; and in its scientific aspects, which interest the physicist, it is too little known to permit of it.

The statute applies the indirect sanctions of the Act only to

those who "ship" subjects of commerce. It does not, however, define "ship." The Government says, "The verb 'ship' is an imprecise word meaning little more than to send or to transport." The term, not being artificially defined by statute, is from the ordinary speech of people. Its imprecision to linguists and scholars may be conceded. But if it is common in the courts, the marketplaces, or the schools of the country to speak of shipping a telegram or receiving a shipment of telegrams, we do not know of it, nor are examples of such usage called to our attention. Nor, if one departs from the complaint in the case and adopts the theory of the Court of Appeals, do we think either scientist or layman would ever speak of "shipping" electrical impulses. The fact is that to sustain the complaint we must supply an artificial definition of "ship," one which Congress had power to enact, but did not. We do not think "ship" in this Act applies to intangible messages, which we do not ordinarily speak of as being "shipped."

Another consideration convinces us that this Act did not contemplate its application by indirection to such a situation as we have in hand. Its indirect sanctions are well adapted to the producer, miner, manufacturer, or handler in preparation for commerce. They become clumsy and self-defeating when applied to telegraph companies, railroads, interstate news agencies, and the like, as this decree demonstrates. The Western Union is not forbidden by the decree to employ child labor, nor could it be, for it is not so forbidden by the Act. As construed by the courts below, what is prohibited is the sending of telegrams—so long as it employs child labor and for a period of thirty days after it quits. This, as the Company observes, is a sanction that the Court could not permit to become effective. A suspension of telegraphic service for any period of time would be intolerable. Of course, the Government says, the Company could escape its effect except for the thirty-day period by discharging some twelve per cent of its messengers, who are under age but whom neither the Court nor Congress has forbidden it to employ. It also suggests that the thirty-day period may be absorbed in delays. Or, it says, the District Court or Circuit Court of Appeals "may properly stay the injunction further in order to permit the transmission of messages until petitioner has a reasonable time to comply."

Of course literal compliance could be made only by ceasing to send messages, since that is all the decree does or could command.

But the Company could and probably would avoid doing what the decree orders, by doing what it does not and cannot order: viz., discharging the under-age part of its messenger force. This, however, would leave the thirty-day period after our mandate becomes final and goes down, during which the courts must stay the force of the injunction, either candidly or by dilatory tactics, or the Company, by continuing service to the public, would be in contempt. Even if this were done, courts cannot stay the provisions under which the sending of messages during such period is made criminal. We may suppose the Government would not actually prosecute. But that is only because the sanctions of the Act, if applied to such a situation, are so impractical that a violation adjudged by us to be proven by stipulation of the parties as to the facts would be waived. We think if Congress contemplated application of this Act to the Western Union it would have provided sanctions more suitable than to forbid telegrams to be sent by the only Company equipped on a nation-wide scale to serve the public in sending them. Nor will we believe without more express terms than we find here that Congress intended the courts to issue an injunction which as a practical matter they would have to let become a dead letter, or enforce at such cost to the public, if a defendant proved stubborn and recalcitrant. If the indirect sanctions of this Act were literally to be applied to great agencies of transportation and communication, the recoil on the public interest would be out of all proportion to the evil sought to be remedied.

However, the indirect sanction of cutting one's goods off from the interstate market is one which can be applied to producers as we have defined them herein effectively and without injury to the public interest. If such a producer using child labor is refused facilities to transport his goods, competitors usually come in, needs are still supplied, and only the offender suffers. These indirect sanctions can practically and literally be applied to the miner and the manufacturer with no substantial recoil on the public interest, and with no gestures by the courts that they cannot follow through to punish disobedience.

Ascertainment of the intention of Congress in this situation is impossible. It is to indulge in a fiction to say that it had a specific intention on a point which never occurred to it. Had the omission of a direct prohibition of this employment been called

to its attention, it might well have supplied it, for any reason we can see. Congress of course has the right to be indirect where it could be direct and to be obscure and confusing where it could be clear and simple. But had it determined to reach this employment, we do not think it would have done so by artifice in preference to plain terms. It is admitted that it is beyond the judicial power of innovation to supply a direct prohibition by construction. We think we should not try to reach the same result by a series of interpretations so far-fetched and forced as to bring into question the candor of Congress as well as the integrity of the interpretative process. After all, this law was passed as the rule by which employers and workmen must order their daily lives. To translate this Act by a process of interpretation into an equivalent of the bills Congress rejected is, we think, beyond the fair range of interpretation. Declining that, we cannot sustain the Government's bill of complaint.

Reversed.

SUPREME COURT OF THE UNITED STATES.

No. 49.—October Term, 1944.

The Western Union Telegraph Company, Petitioner, *vs.* Katharine F. Lenroot, Chief of the Children's Bureau, United States Department of Labor.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[January 8, 1945.]

Mr. Justice Murphy, dissenting.

By reading into the Fair Labor Standards Act an exception that Congress never intended or specified, this Court has today granted the Western Union Telegraph Company a special dispensation to utilize the channels of interstate commerce while employing admittedly oppressive child labor. Such a result is reached, to borrow the words of the majority opinion, "by a series of interpretations so far-fetched and forced as to bring into question the candor of Congress as well as the integrity of the interpretative process."

The opinion of the Court demonstrates that the legislative history of the Fair Labor Standards Act is inconclusive insofar as the failure to insert a provision directly prohibiting child labor in interstate commerce is concerned. But that factor is neither determinative nor even significant in the setting of this case. The issue is not whether the child labor provisions of Section 12(a) apply to a company solely engaged in interstate commerce or in the transporting of goods in such commerce. Rather the crucial problem is whether Western Union, in preparing messages for transmission in interstate commerce, may fairly be said to be a "producer" of "goods" which it "ships" in interstate commerce so as to come within the purview of Section 12(a). That Western Union may also be the interstate transmitter of messages is beside the point; it is enough if it is a producer of goods destined for interstate shipment. Indeed, Section 15(a)(1) expressly envisages just such a situation. It provides in part that no common carrier

shall be liable under this Act "for the transportation in commerce in the regular course of its business of any goods not produced by such common carrier," thereby recognizing that if a carrier is actually the "producer" of the "goods" it transports it may be visited with the liabilities of Section 12(a).

In approaching the problem of whether Western Union is a producer of goods shipped in interstate commerce we should not be unmindful of the humanitarian purposes which led Congress to adopt Section 12(a). Oppressive child labor in any industry is a reversion to an outmoded and degenerate code of economic and social behavior. In the words of the Chief Executive, "A self-supporting and self-respecting democracy can plead no justification for the existence of child labor. . . . All but the hopelessly reactionary will agree that to conserve our primary resources of man power, Government must have some control over . . . the evil of child labor. . . ." Message of the President to Congress, May 24, 1937, House Doc. No. 255 (75th Cong., 1st Sess.) p. 2. Congress sought in Section 12(a) to translate these sentiments from rhetoric to law. That it may not have done so to the full limits of its constitutional power is not of controlling significance here. It matters only that courts should not disregard the legislative motive in interpreting and applying the statutory provisions that were adopted. If the existence of oppressive child labor in a particular instance falls within the obvious intent and spirit of Section 12(a), we should not be too meticulous and exacting in dealing with the statutory language. To sacrifice social gains for the sake of grammatical perfection is not in keeping with the high traditions of the interpretative process.

The language of Section 12(a), when viewed realistically and with due regard for its purpose, compels the conclusion that Western Union has been guilty of a violation of the child labor provisions. Oppressive child labor conditions are admitted and the only issue concerns the application of the words "goods", "producer" and "ships" to the activities of Western Union.

1. The opinion of the majority concedes that telegraphic messages are "subjects of commerce," *Gibbons* v. *Ogden*, 9 Wheat. 1, 229-230, and hence are "goods" as defined in Section 3(i) of the Act.

2. The majority holds, however, that Western Union is not a "producer" of goods, even though the term "produced" is defined in Section 3(j) to include "handled, or in any manner worked on." It further holds that the words "handled" or "worked on" refer only to incidental operations preparatory to putting goods in the stream of commerce and that they cannot relate to a "handling" or "working on" which accomplishes the interstate movement in commerce itself (which is said to characterize Western Union's activities). Even if we assume that this distinction is correct, however, it does not preclude Western Union from being described as a "producer". Contrary to the view expressed in the majority opinion, the Government does not ground its case in this respect on a claim that mere transportation of goods by a carrier such as Western Union constitutes a "handling" or "working on" so as to make that carrier a producer. The contention, rather, is that Western Union employees, *prior to the introduction of the messages into interstate commerce*, "work on" and "handle" the messages. And that contention would seem to be justified by the facts.

Before the messages actually move in commerce, Western Union employees aid in the composition of the messages, write them on blanks, mark the written messages, transform them into electric impulses and perform numerous other incidental tasks. In a very real and literal sense, therefore, they "handle" and "work on" a message before it enters the channels of interstate commerce. The uniqueness of Western Union insofar as it acts also as the interstate carrier of these messages does not negative the fact that it actually processes and hence "produces" the messages as a preface to that interstate transit.

3. Finally, the majority does not think that the verb "ship" is applicable to the transmission either of electrical impulses or intangible messages and hence Western Union does not "ship" goods in commerce within the meaning of Section 12(a). As a matter of linguistic purism, this conclusion is not without reasonableness. But proper respect for the legislative intent and the interpretative process does not demand fastidious adherence to linguistic purism. This Court does not require that Congress spell out all types of "goods" or "subjects of commerce" that move in interstate commerce; no more should it require that Congress spell out every verb that may be in usage as to various

goods or subjects of commerce. If the verb actually used by Congress may fairly be interpreted to cover the particular situation in a manner not at variance with the intent and spirit of the statute, no sound rule of law forbids such an interpretation.

As a matter of fact, it is unnecessary to strain reality in order to apply the verb "ship" to the transmission of telegraph messages. The verb is defined by competent authority to mean "to transport, or commit for transportation." Webster's New International Dictionary (2d Ed.). This Court itself has referred to telegraph companies as engaged in "transportation" of messages. *Western Union Tel. Co.* v. *Texas*, 105 U. S. 460, 464. Since messages are "goods" and since Western Union is the "producer" of them, there is no difficulty in saying that it "ships" or "transports" the messages in commerce when its employees send them across state lines.

Such an interpretation and application of the clear statutory words are not only realistic but are in obvious accord with the statutory policy of eliminating oppressive child labor in industries transporting goods and subjects of commerce across state lines. The natural ease with which these words fit the activities of Western Union adds weight to the conclusion that Section 12(a) covers just such a situation as this. There is nothing in the statute or in its legislative background to suggest that telegraph companies are exempt and the consistent administrative attitude has been that no such exemption exists. Child Labor Regulation No. 3, issued by the Chief of the Children's Bureau, U. S. Department of Labor, May 8, 1939; Wage and Hour Field Instructions, June 4, 1942. It is indisputable that the evils of oppressive child labor allow no distinction in favor of the employment of telegraph messengers of tender years. Cf. *United States* v. *Rosenwasser*, 323 U. S. —. Indeed, the reference to messengers in Section 14 of the Act is evidence of an awareness by Congress that the Act would reach such persons. If Congress found it necessary to provide in Section 14 for certain exceptions as to minimum wages for messengers, it seems clear that Congress thought that all other appropriate provisions of the Act applied to all messengers absent specific exceptions. Moreover, even Section 14 makes no distinction between messengers working in and about manufacturing establishments shipping goods in commerce, who presumably still come within the provisions of

Section 12(a) under the majority's view, and those employed by telegraph companies. Under these circumstances we are not justified in delineating an exception to Section 12(a) that Congress itself did not see fit to make explicitly.

A word need be said about the Court's fear of enforcing Section 12(a) against Western Union. Pursuant to the Congressional mandate, the trial court enjoined Western Union from transmitting or delivering for transmission in commerce "telegraph or other messages or any other goods" produced by it in any establishment in or about which within 30 days prior to the transmission there shall have been employed any oppressive child labor. It is said, however, that this is a sanction that we dare not permit to become effective since the suspension of telegraphic service for 30 days would be intolerable. Such a sanction is said to be well adapted to the producer, miner, manufacturer or handler but clumsy and self-defeating when applied to telegraph companies, railroads and the like. Convinced by these considerations that the Act did not contemplate its application to this situation, the Court proceeds to carve out a judicial exception to Section 12(a) for all interstate carriers.

However much we may dislike the imposition of Congressional sanctions against a particular industry or field of endeavor, the judicial function does not allow us to disregard that which Congress has plainly and constitutionally decreed and to formulate exceptions which we think, for practical reasons, Congress might have made had it thought more about the problem. To read in exceptions based upon the nature or importance of the particular industry or corporation is dangerous precedent. If the suspension of telegraphic service for 30 days is so intolerable as to justify lifting the burden of Section 12(a) from the shoulders of Western Union, can it not be argued with equal fervor that a 30-day injunction against interstate shipments by an airplane manufacturer, a munitions plant or some other industry vital to a war or peace time economy would be likewise intolerable? What valid distinction in this respect is there between interstate carriers and manufacturers or producers? Moreover, are we to examine the competitive situation or degree of importance of a particular company to determine the amount of intolerableness which a suspension of interstate transportation might engender? These and countless other legislative problems present themselves when we embark upon a course of fashioning exceptions to a statute

according to our own conceptions of appropriateness of the sanctions of an Act. Such a course is an open invitation to wholesale veto of valid and reasonable legislative provisions by means of judicial refusal to apply statutory enforcement measures. Adherence to the sound rule that inequities and hardships arising from statutory sanctions are for Congress rather than the courts to remedy by way of amendment to the statute is desirable and necessary in such a situation.

We are charged with the duty of interpreting and applying acts of Congress in accordance with the legislative intent. Courts are not so impotent that they cannnot perform that duty and, at the same time, grant stays or other appropriate relief in the public interest should the occasion demand it. See *Standard Oil Co.* v. *United States*, 221 U. S. 1, 81; *United States* v. *American Tobacco Co.*, 221 U. S. 106, 187, 188. Thus if the injunction is granted here against Western Union, we will have vindicated to that extent the public policy against oppressive child labor. If a 30-day suspension of telegraph messages would unduly harm the public interest, a stay of the mandate or of the injunction can be granted until at least 30 days have elapsed during which no oppressive child labor has been employed by Western Union. Thus by fashioning remedies through injunctions and stays we can aid in the elimination of oppressive child labor without undue hardship on the public. This can and should be done without abdicating our judicial function and assuming the role of the legislature.

Mr. Justice BLACK, Mr. Justice DOUGLAS and Mr. Justice RUTLEDGE join in this dissent.